Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	Docket No. 21–CRB–0001–PR (2023–2027)

WRITTEN DIRECT STATEMENT OF COPYRIGHT OWNERS

(with Proposed Rates and Terms as corrected by the Notice of Errata dated October 25, 2021)

VOLUME I

PUBLIC VERSION

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	Docket No. 21–CRB–0001–PR (2023–2027)

WRITTEN DIRECT STATEMENT OF COPYRIGHT OWNERS

PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036-6569
Phone: (212) 421-4100
Facsimile: (212) 326-0806

Attorneys for Copyright Owners

Of Counsel:

Benjamin K. Semel
Frank P. Scibilia
Donald S. Zakarin
Email: bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com

INDEX OF COPYRIGHT OWNERS' WRITTEN DIRECT STATEMENT

INDEX OF WITNESS TESTIMONY ON BEHALF OF COPYRIGHT OWNERS

Statement No.	Witness Name	Title
1	Steve Bogard	Songwriter
2	Jamie Floyd	Songwriter
3	Angela Hunte	Songwriter
4	Autumn Rowe	Songwriter
5	Jimmy Yeary	Songwriter
6	JW Beekman	Global Chief Financial Officer, Universal Music Publishing Group
7	Peter Brodsky	Executive Vice President, Business and Legal Affairs, Sony Music Publishing
8	Timothy Cohan	Chief Counsel, peermusic
9	Thomas Kelly	Global Chief Financial Officer, Sony Music Publishing
10	David Kokakis	Chief Counsel, Universal Music Publishing Group
11	Annette Yocum	Vice President of Finance, Warner Chappell Music, Inc.
12	Jeffrey A. Eisenach	Expert witness
13	Robin Flynn	Expert witness
14	Daniel F. Spulber	Expert witness
15	Richard Watt	Expert witness

WRITTEN DIRECT STATEMENT OF COPYRIGHT OWNERS

National Music Publishers' Association, Inc. ("NMPA") and Nashville Songwriters Association International ("NSAI" and, together with NMPA, the "Copyright Owners") respectfully submit this written direct statement pursuant to the Board's Order Granting Joint Motion to Modify the Case Scheduling Order, eCRB Docket No. 25555 (Aug. 3, 2021). Copyright Owners' submission includes the documents that are listed in the Table of Contents below and appended hereto.

TABLE OF CONTENTS

Volume IV – Expert Witness Statements

Part	Document(s)
A	Written Direct Testimony of Jeffrey A. Eisenach
B	Written Direct Testimony of Robin Flynn Written Direct Testimony of Daniel F. Spulber Written Direct Testimony of Richard Watt

Volume V – Designated *Phonorecords III* Records and Testimony

Part	Document(s)
A	Designated Records and Testimony of Christopher Barry
B	Designated Records and Testimony of Jeffrey A. Eisenach
C	Designated Records and Testimony of Joshua Gans and David Israelite
D	Designated Records and Testimony of Marc Rysman, Jim Timmins and Richard Watt

Volume VI – Copyright Owners' Exhibits

Part	Document(s)	Exhibits
A	Exhibits sponsored by JW Beekman Exhibits sponsored by Peter Brodsky Exhibits sponsored by Timothy Cohan	COEX-1.1 through COEX-1.5 COEX-2.1 through COEX-2.31 COEX-3.1 through COEX-3.13
B	Exhibits sponsored by Thomas Kelly Exhibits sponsored by David Kokakis	COEX-4.1 through COEX-4.12 COEX-5.1 through COEX-5.35
C	Exhibits sponsored by Annette Yocum Exhibits sponsored by Jeffrey A. Eisenach	COEX-6.1 through COEX-6.6 COEX-7.1 through COEX-7.26
D	Exhibits sponsored by Jeffrey A. Eisenach	COEX-7.27 through COEX-7.51
E	Exhibits sponsored by Jeffrey A. Eisenach	COEX-7.52 through COEX-7.82
F	Exhibits sponsored by Robin Flynn	COEX-8.1 through COEX-8.80
G	Exhibits sponsored by Robin Flynn	COEX-8.81 through COEX-8.130
H	Exhibits sponsored by Robin Flynn Exhibits sponsored by Richard Watt Exhibit sponsored by Steve Bogard	COEX-8.131 through COEX-8.188 COEX-9.1 through COEX-9.21 COEX-10.1

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	Docket No. 21–CRB–0001–PR (2023–2027)

WRITTEN DIRECT STATEMENT OF COPYRIGHT OWNERS

INTRODUCTORY MEMORANDUM

Table of Contents

National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners") respectfully submit this Introductory Memorandum in connection with the filing of their Written Direct Statement ("Statement") to provide the Copyright Royalty Judges ("Judges") with an overview of Copyright Owners' position, testimony and proposed rates and terms for mechanical royalties under Section 115 of the Copyright Act, effective from January 1, 2023 through December 31, 2027 (the "Proposed Rates").

I. Introduction

Five years ago, Copyright Owners came before the Judges in the first fully-contested proceeding to set rates and terms for interactive streaming. In that proceeding, witnesses for Copyright Owners identified profound challenges raised by the growing streaming industry to the royalty income of songwriters and music publishers. Copyright Owners also warned of a coming storm, as streaming grew in market share and the streaming service industry came to be dominated by the largest corporations in the world.

The intervening years have proved true the concerns of Copyright Owners. Copyright Owners' evidence in the last proceeding takes on additional weight in light of how its predictions were borne out in the market. New evidence is even more compelling in demonstrating the need to increase rates and adjust the rate structure and terms to ensure that they are reasonable under the new willing buyer/willing seller rate standard.

It is not hyperbole to say that the future of the American song will be shaped by this proceeding. While the royalties at issue here are a rounding error for the trillion-dollar companies that now comprise the majority of the streaming service market, this proceeding will determine a substantial portion of the income of songwriters and music publishers, significantly affecting the industry and compensation of those who create and develop the music of the country.

As the Copyright Office has reported:

> Viewed in the abstract, it is almost hard to believe that the U.S. government sets prices for music. In today's world, there is virtually no equivalent for this type of federal intervention – at least outside of the copyright arena . . . Compulsory licensing removes choice and control from copyright owners who seek to protect and maximize the value of their assets.[1]

Since the Copyright Act prevents songwriters and their music publishers from negotiating mechanical royalties in the marketplace, they must rely on the Judges to set rates that fully compensate them for the American songbook that drives the entire music industry and enriches our everyday lives. As explained in the testimony herein, higher rates and improved terms are necessary to fulfill the new rate standard and protect the rights of copyright owners that have been commandeered by law. Copyright Owners' full Proposed Rates are outlined below and detailed in the accompanying Proposed Rates and Terms document.

II. Current market realities support the proposed higher rates and improved terms

A. Songwriters face decreased streaming royalties and an uncertain future

The deeply concerning economic circumstances that the songwriting industry faces was clear in *Phonorecords III* and has intensified in the intervening years. Yet songwriters will always remain the bedrock of the entire music industry. "It all begins with a song" is not just a truth, but a touchstone for this proceeding. There are songs without music streaming services; there are no

[1] U.S. Copyright Office, *Copyright and the Music Marketplace* 145, 148 (Feb. 2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

music streaming services without songs. In a willing buyer/willing seller negotiation in an effectively competitive market, this encapsulation of necessity and value would be inescapable.

Songwriting is also an industry, and one that requires not only talent but also an extraordinary investment of time and effort to produce quality product. It is an industry of collective individual enterprise that often has little buffer between profit level and putting dinner on the table. Songwriter testimony in this statement explains the reality of this industry, the effort and investment of working songwriters, and the fact that potential market exit is a daily reality for songwriters, who must balance the call to contribute to our songbook against the need to provide for their families in an era of inadequate royalties.

This testimony further explains that the increase in royalty rates that the Judges agreed in *Phonorecords III* was needed "to ensure the continued viability of songwriting as a profession" never materialized in practice. (Publisher and expert testimony explains why the increase in royalty rates did not occur, including because of the large effects of new family and student plan subsidies, increased underpricing and revenue displacement, and increased information asymmetry as the streaming market has become dominated by giant diversified technology companies.)

Yet the precarious financial situation of songwriters must not be confused with the value of their songs, which is steady and strong. The petition of songwriters in this proceeding is not one for charity, but one that asks the Judges to reflect in the rates and terms what the custodian of their rights could obtain at the table in a free negotiation over the American songbook.

B. Music publishers provide more songs to the Services, [redacted], but face streaming royalty rates that remain too low

Music publishers are financial supporters and creative collaborators of songwriters in the endeavor to create songs. Music publishers discover songwriting talent and provide songwriters with financial support in the form of advances so that songwriters can focus on writing while still paying their bills. Music publishers create opportunities for songwriters to collaborate with other writers and artists, creatively guide songwriters through songwriting camps and creative sessions, promote and license their writers' songs for exploitation, and administer and protect their songwriters' copyrights. Music publishers provide these services to their songwriters at considerable expense and receive in exchange a shrinking share of the royalties generated by their songs. Publishers often do not recoup their substantial collective investments in songwriters. Songwriters and music publishers depend on each other for their respective success.

While absolute royalty dollars from streaming have increased in recent years, this conceals that royalty *rates* for streaming remain far too low, resulting in the increase being far less than it should be and far below a reasonable return. Streaming has devastated all other mechanical revenue flows, and streaming royalties have not risen enough to compensate adequately for these losses, let alone for the massive growth in usage and the substantially larger music catalogs that are now made available pursuant to the blanket mechanical compulsory license.

Streaming not only substitutes for, and does not promote, royalties from other forms of distribution, but the amount of music product being licensed for streaming has grown substantially. The streaming services in this proceeding (the "Services") now obtain a substantially larger aggregate catalog of songs through the blanket compulsory license than they did five years ago. Because storing additional music files comes at virtually no cost for the Services, existing music is not purged from their catalogs (the way it would have been removed from production and record store shelves in the era of physical product), while new music is constantly added. Streaming service catalogs peaked at 30 to 50 million tracks during *Phonorecords III*, where there was consensus among witnesses for both licensors and licensees that larger catalogs were more valuable catalogs worthy of higher rates. Today, the Services' catalogs are now 75 million tracks or higher. These larger catalogs provide more value to more users, driving more overall usage of music and more overall customers to the diversified Services. But the larger catalogs and increased usage also mean that there are more songs and songwriters to be paid.

In the face of these significant market changes, music publisher support for songwriters has remained steadfast. Music publishers [redacted]. Music publishers are also [redacted] to songwriters. However, low streaming royalties have contributed to [redacted], and necessarily limit the ability of publishers to continue to finance advances to both new and established songwriters as well as ultimately impacting their ability to provide the necessary administrative services.

Advances are the lifeblood of the songwriting industry, providing songwriters necessary funds to cover living costs so that they have the time required to create songs instead of having to work in other activities. Early-stage investments in songwriters are necessary to develop the next generation of great songwriters to add to the American songbook. Without advances, much great music will never be written. Yet the ability of this advance system to meet the needs of songwriters is impeded, largely due to low royalties from streaming.

This again is not just a story of need, but one of negotiation points. If they were willing sellers in a free market, music publishers would never agree to rates so low that they strain their margins and their ability to provide advances necessary to maintain songwriting as an industry.

C. The Services have experienced explosive gains

Amazon, Apple and Google now make up [redacted] the streaming market, and together with Spotify make up [redacted] percent of the market. These Services have experienced phenomenal growth and success in recent years, including to their streaming platforms.

In the introduction to Copyright Owners' written direct statement in *Phonorecords III*, Copyright Owners wrote that Spotify "makes no effort to maximize its advertising revenues, but operates with the primary goal of growing its user base and further increasing its $8.5 billion enterprise value." That $8.5 billion now seems quaint. Spotify's enterprise value has since skyrocketed, and since the start of this proceeding has ranged from $40 billion to $70 billion.

These gains put the lie to the story that mechanical royalty rates reflect reasonable compensation. Over the past five years, Spotify's total, aggregate mechanical royalties at compulsory rates were [redacted] of the gains that Spotify's shareholders have received in that time. Spotify's CEO *alone* has received equity gains that are [redacted] than what Spotify paid in total mechanical royalties *to the entire songwriting and music publishing industries since Phonorecords III*.

Spotify's share price is not affected by its accounting profit numbers because analysts understand that for Spotify, as its CFO explained, "profit margin is a managed outcome, … a by-product of the pace we choose" to drive growth.[2] Spotify's competition for customers, who in the

[2] COEX-8.43 (Spotify 2018 Q3 Earnings Call), at 7.

digital world can be monetized in many different ways, drives its share gains. But while those customers have been acquired through the availability and exploitation of a massive catalog of songs, and Spotify's shareholders have already realized the benefits of that acquisition through increased share value, copyright owners have been denied a seat at the bargaining table and a reasonable share, left with only [redacted] of the gains from a business built entirely on the back of their valuable and irreplaceable songbook.

Spotify's success story, as remarkable as it is, is dwarfed by the giant technology services, who have each seen even more astronomic growth. Amazon, Apple and Google all shattered the trillion-dollar equity value mark since *Phonorecords III*, and together have seen their value increase from $1.5 trillion to more than $6 trillion. These bewilderingly large numbers are not simply extra zeros for this proceeding. As discussed below, the domination of the streaming industry by companies so large and aggressive in their market power that they have all three branches of government scrambling to keep up is central to this proceeding, which in some ways presents a microcosm of the monopoly and competition concerns facing the economy as a whole from these companies.

III. <u>Continued seismic market changes make higher rates and improved terms even more imperative</u>

A. *Growth*: Streaming has seen astronomic growth

The massive growth in interactive streaming that preceded *Phonorecords III* has been eclipsed by the growth since *Phonorecords III*. The increasing availability and transmission speed of Internet data, particularly mobile data, has allowed the access model to dominate over the ownership model of music consumption. Aggregate plays at the start of this proceeding were more than [redacted] higher than they were at the start of *Phonorecords III*, and more than [redacted]

[redacted] higher than they were when *Phonorecords II* was settled. As seen on this historical chart, plays at the time of the *Phonorecords II* settlement are barely distinguishable from the x-axis:

<u>Aggregte Industry Plays (November 2007 – May 2021)</u>[3]
(Eisenach WDT, Figure 3)

[redacted]

[3] This chart maps growth by reference to plays of songs for two reasons. First, plays are indisputably the clearest indicator of usage, which must be a touchstone for royalties. As the Judges have held, "the more the rights being licensed are used, the more payments should increase in direct proportion to usage." Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 72 FR 24084, 24090 (May 1, 2007) ("*Web II*"). Second, while other metrics are important indicators of value that should be considered in setting rates, they are less reliably reported indicators of market activity. As discussed in detail in the testimony, declared revenue is notoriously diminished by revenue deferment and displacement, a reality that has dramatically increased as the largest, most diversified companies in the world have come to dominate the streaming market. And while access to music is a type of usage and a substantial value to consumers that must be reflected in compulsory rates, reported subscriber counts do not accurately capture that access because they omit many millions of users on free plans or promotions, numbers that have also grown rapidly in recent years.

B. *Shift*: Streaming has become fully dominated by diversified companies, and primarily Big Tech firms

The growth of streaming has been accompanied by an even more disruptive force: the shift of the streaming industry to large, diversified companies, that sell products and services beyond music streaming. At the time of the *Phonorecords II* settlement, the interactive streaming market was *zero* percent diversified. Throughout the *Phonorecords III* proceedings, about [redacted] percent of usage came from diversified companies. Now, more than [redacted] *percent* of plays in the market come from diversified companies. Pureplay streaming services have disappeared from the mainstream, and interactive streaming in America has become primarily a feeder product for the complementary business lines of giant technology companies.

<u>Percent of Aggregate Industry Plays Made by</u>
<u>Diversified, Multi-Product Services (November 2007 – May 2021)</u>
(Eisenach WDT, Figure 4)

[redacted]

This market shift cannot be overemphasized in this proceeding. Diversified companies have a fundamentally different motivation than pureplay services. All companies seek to maximize discounted future profits across their entire enterprise. Their strategies for pricing, marketing and other aspects of their interactive streaming products will all be directed to that end. For diversified companies, this means that decisions about streaming are made in view of complementary revenue streams that are not reported under the compulsory license. Moreover, for Amazon, Apple and Google, the complementary revenue streams are so mammoth by comparison to their streaming products (and the entire music industry) that they require purposeful thought and modeling to truly understand and account for properly. The complementary revenue streams of these three companies are [redacted] than the size of their declared U.S. interactive streaming revenues. Everyday economic intuition can break down at this enterprise size, [redacted].

<u>Comparison of Global and U.S. Complementary Business Line Revenues to U.S. Streaming Revenues (2020)</u>
(Flynn WDT, Figure 4)

[redacted]

The use of music as means to an end (driving ecosystem profits) by these companies is not the end of the story. America has been confronting the mounting problem of anticompetitive behavior by these technology companies in many areas, and this proceeding implicates the same concerns that Congress, regulators and prosecutors are scrutinizing in other forums. These companies are not just competing for the music streaming market, and not just underpricing streaming as part of a strategy to tip that one market, but are underpricing streaming to strengthen their monopoly grip on other markets as well, which together form even more impregnable barriers to competition. For example, Amazon's underpricing strategy for music directly furthers its Prime offering and its larger monopoly grip on retail that allows it to "control pricing across the entire online retail sales market"—a monopoly that the District of Columbia is currently in court seeking to enjoin.[4] While the rates and terms set in this proceeding cannot prevent predatory discounting and bundling across multiple markets, they cannot and should not be designed to enable and incentivize those practices, especially where such practices also diminish the royalties due to copyright owners.[5] Rate structures or terms that force copyright owners to subsidize and underwrite the monopolistic practices of the largest companies in the world would be inconsistent with the governing rate standard, which the Judges have ruled should reflect an effectively competitive market.

Nor is Spotify a solution to the concerns about the giant Services' anticompetitive practices. To begin with, Spotify has been slowly overtaken by these firms, whose shocking size (the market capitalization of the three Big Tech Services is larger than the GDP of the entire continents of South America and Africa combined) offers insurmountable competitive

[4] Complaint at 25, *District of Columbia v. Amazon.com, Inc.*, No. 2021-CA-001775-B (D.C. Super. Ct. May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf.

[5] Amazon offers college students—among the most prized consumer demographic due to high expected future earnings and customer lifetime value—premium on-demand subscriptions for just *99 cents* per month—*if* they also buy an Amazon Prime membership, which Congress has identified as part of Amazon's "predatory-pricing strategy." House Judiciary Subcomm. on Antitrust, Com, & Admin, L., Investigation of Competition in Digital Markets, at 294 (2020) https://judiciary house.gov/uploadedfiles/competition_in_digital_markets.pdf_("House Report on Digital Markets") ("The most prominent example of Amazon's use of strategic losses to lock customers into the platform's ecosystem is its popular membership program, Amazon Prime."). The *Phonorecords III* rate discount for student plans forces songwriters and music publishers to subsidize Amazon's predatory-pricing strategy.

advantages.[6] But even further, Spotify, which had for a long time remained a pure-play alternative to the Big Tech companies, responded to the rapid growth of its titan competitors by adopting the strategy of "if you can't beat 'em, join 'em." Spotify has now trained its focus on diversifying and developing alternative product revenue streams. Since 2019, Spotify has acquired three companies and spent over $1 billion on exclusive content to develop a substantial podcast business that it boasts to investors is a revenue stream that it does not share with music creators. Yet this revenue stream depends entirely on music streaming product to obtain its customers and has been built on the back of music. Spotify does not even offer an independent podcast app, but instead generates its podcast revenue stream directly through its music streaming app, which rests on the work of song copyright owners.

In an earnings call in May 2020, Spotify's CEO, Daniel Ek, responded to a question concerning "greater podcast consumption" by explaining that, "[w]ell, it's really about taking a step back and I think what we are seeing here is the beginning of our flywheel. So as we talked about before, Spotify is now going after all of audio and that's obviously a significantly larger market than just the music industry."[7]

The "flywheel" that Ek references is a business concept:

> The premise of the flywheel is simple. A flywheel is an incredibly heavy wheel that takes huge effort to push. Keep pushing and the flywheel builds momentum. Keep pushing and eventually it starts to help turn itself and generate its own momentum—and that's when a company goes from good to great.[8]

---

[6] *List of Public Corporations by Market Capitalization*, Wikipedia, https://en.wikipedia.org/wiki/List_of_public_ corporations_by_market_capitalization (last visited Oct. 10, 2021); *List of Continents by GDP (nominal)*, Wikipedia , https://en.wikipedia.org/wiki/List_of_continents_by_GDP_(nominal) (last visited Oct. 10, 2021).

[7] COEX-8.43 (Spotify 2020 Q2 Earnings Call), at 7.

[8] Jeff Haden, *Best from the Brightest: Jim Collins's Flywheel – A classic business concept revisited*, INC. (Jan. 21, 2014), https://www.inc.com/jeff-haden/the-best-from-the-brightest-jim-collins-flywheel html.

As Ek prepares to reap the benefits of expansion into "a significantly larger market than just the music industry," it is music that pushes the flywheel making it all possible. The "huge effort" that has been generating the momentum is the collective efforts of those crafting the tens of millions of songs on Spotify's platform. Spotify and other streaming services have argued for lower mechanical royalties on the claim that they are not earning enough profits and need a break in order to survive. But it is now clear that profit from streaming products has been a "managed outcome"[9] for Spotify and a purposeful misdirection by the tech giants who have no reason to try to generate profits from music streaming—it is really just a customer acquisition tool to drive far larger profits elsewhere in their ecosystems than any modest increase in the subscription rate for music could ever provide. And after years of having songwriters put their shoulders to the wheel to generate Spotify's momentum at below-market royalties, now that the wheel is flying, Spotify looks to run songwriters over with it on its way to profits in a "significantly larger market," which Ek stressed, "will be a 100% Spotify's and not shared."[10]

Thus, the new market reality for interactive streaming is one in which the wondrous, captivating and life-defining power of the song is used as honey to monopolize a customer base that can then be packaged and sold to advertisers or shuttled to other product lines that are "not shared." The focus of the streaming services is increasingly on strategies outside of music, and lost in the battle among Godzillas for the lifetime values of people seeking music are the songwriters, who fuel it all but have no seat at the market table, only a seat in this proceeding. The

---

[9] COEX-8.43 (Spotify 2018 Q3 Earnings Call) at 7.

[10] *Id.* (Spotify 2020 Q2 Earnings Call), at 7, 15.

need for stronger rates and terms via this proceeding to ensure the delivery of proper mechanical royalties has never been more critical.

C. *Supplant*: Streaming has substituted for and decimated other mechanical royalties

The rate standard directs that rates and terms be based on information that includes "whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works." 17 U.S.C. § 115(c)(1)(F)(i). This is a straightforward factor to resolve. As discussed above, the rise of streaming has corresponded with the decimation of all other mechanical royalty flows, and while streaming revenues have risen year over year since the last proceeding, copyright owners still receive [redacted] than before the rise of streaming.

Streaming is an unequivocally negative force on copyright owners' other forms of revenue, and particularly on "the sales of phonorecords" which have plummeted as consumers have shifted to streaming. Streaming royalty rates as they stand (including at fully-implemented *Phonorecords III* rates) remain too low and too marked by loopholes and discounts. The loss of these existing revenue streams—and the accelerating drop in performance income from sources other than streaming—only compounds the inadequacy of the streaming rates and further support higher rates and improved terms.

IV. <u>Economic analysis demonstrates that the Proposed Rates are necessary, reasonable and conservative under the rate standard</u>

The testimony in this statement provides a wealth of evidence and analysis concerning the music and streaming industries, including concerning competition, benchmarks, game theoretic modeling, and actual market conditions and usage. The evidence supports the adoption of the proposed rate structure, rate levels, and associated terms and definitions that are detailed in the accompanying Proposed Rates and Terms. Below is an outline of selected portions from the economic analysis presented in the testimony herein, which explains how the Proposed Rates meet the rate standard.

A. Shapley analysis demonstrates that the Proposed Rates are conservative

Analysis of surplus division using game theory modeling known as Shapley analysis was of course a central part of the *Phonorecords III* proceeding under the former Section 801(b) rate standard. Shapley analysis was also a part of the *Web V* proceeding under the willing buyer/willing seller standard. As Professor Richard Watt explains, Shapley analysis is a perfect model for assessing rates under a willing buyer/willing seller model in an effectively competitive market. The aptness of the model is heightened by the specific statutory direction that the Judges should base the rates on evidence that includes the relative roles of the copyright owner and the compulsory licensee in the venture.

Professor Watt presents the most robust Shapley analysis yet seen in a rate proceeding, building a model from the ground up using empirical data and analyzing the outcomes under a variety of assumptions and modeling choices. He explains the basis for the assumptions and ranges and shows the moving pieces in the analysis. The results are unequivocal in reflecting that mechanical rates should be increased. Indeed, Professor Watt's modeling reveals that musical work royalty shares should far exceed even the Copyright Owners' proposed percentage of Service "revenue," where "revenue" should capture *all* gains that result from the use of the copyrighted works by the Services.

Professor Watt also provides an illuminating window into the elephant in the room in this proceeding, namely, how the Judges can assess the revenues displaced to other Service product lines. He shows within the Shapley model how displaced revenues alter surplus division if they are factored in by the parties. This modeling effectively shows what would occur if the asymmetry of information between the parties was removed. Such modeling is essential to determining an effectively competitive rate, because as the Judges have explained, "[o]ne of the necessary conditions for a market to be effective is the absence of asymmetric information."[11] And the results are dramatic. As discussed earlier, the size of the Services' complementary product markets shows that even a miniscule impact on the growth of these other product lines alone would call for royalty rates well *above* the Proposed Rates.[12]

B. The market benchmarks and royalty history support the Proposed Rates

Dr. Jeffrey Eisenach analyzes an array of benchmarks for the Judges that address the proposed rate structure, rate levels and terms.

With respect to the rate structure, each of the proposed rate prongs is [redacted]. The rate structure in the Proposed Rates is very similar to the structure adopted in *Phonorecords III*, which was [redacted]. The primary change to that rate structure is the inclusion of a per-play rate. Copyright Owners and Apple of course proposed a per-play rate prong in *Phonorecords III*, which

---

[11] Final Determination, *Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances* (*Web V)*, Docket No. 19-CRB-0005-WR (2021-2025) (July 22, 2021) ("*Web V* Final Determination"), at 207 fn. 287.

[12] It is reasonable to ask, if robust modeling shows that royalty rates likely should be even higher than the Proposed Rates, why are Copyright Owners not proposing those higher rates? The answer is that Copyright Owners are proposing rates and terms that would be a meaningful improvement, while also comfortably within existing benchmark and market evidence. While Copyright Owners believe that the century of regulation that has warped the entire industry around below-market mechanical royalties should be removed in one fell swoop, they are also mindful of the importance of providing the Judges with full comfort regarding the reasonableness of Copyright Owners' proposed rates.

was not implemented by the Judges, although the Judges did set a per-play rate in the recent *Web V* determination. Dr. Eisenach explains how the justification for a per-play rate for interactive streaming has grown in the intervening years. Among the evidence is that [redacted].

With respect to rate levels, Dr. Eisenach examines voluntary agreements in the interactive streaming market covering musical works and sound recordings, as well as agreements in other competitive and adjacent markets. He shows how each of the rate levels in the Proposed Rates is fully supported by not just the most relevant current benchmarks but also historical royalties and usage and the evidence underlying the economic analysis in *Phonorecords III*.

With respect to the TCC rate level, the Proposed Rates accept the 2.5:1 ratio of sound recording to musical work royalties that the Judges determined in *Phonorecords III* was supported by the evidence, which in turn indicates the proposed 40 percent TCC rate. Professor Watt's updated Shapley analysis indicates a higher TCC, corroborating that this is a conservative approach. While the Judges reduced that percentage in setting a TCC rate in *Phonorecords III*, relying on the Services' arguments that the record companies' purported oligopoly artificially inflated the rates, the persuasiveness of those arguments can no longer withstand scrutiny. There is no basis to conclude that record companies are receiving too *much* in their bargains with the Services. As the recent determination in *Web V* indicates, Spotify [redacted]. The interactive market is now dominated by those very Big Tech companies, and it can no longer be argued with a straight face that those companies—[redacted]

[redacted]—do not themselves have sufficient countervailing power and need a thumb on the scale in their favor.[13]

With respect to revenue prong rate levels, Dr. Eisenach examines musical work agreements in the free market and in the shadow of the compulsory license, as well as sound recording agreements in the free market. Suitable benchmarks, including sound recording benchmark agreements adjusted using the conservative 2.5:1 ratio accepted by the Judges in *Phonorecords III,* indicate musical work rate levels [redacted], again showing the Proposed Rates to be conservative.

With respect to per-subscriber and per-play rate levels, Dr. Eisenach also begins by adjusting rate level benchmarks from interactive streaming sound recording licenses, showing that the rate levels are supported by those benchmarks. To provide the Judges with additional transparency and comfort, Dr. Eisenach also provides a royalty benchmark analysis across all Section 115 blanket licensees in the country. Dr. Eisenach analyzes royalty data across the entire streaming industry to show the reasonableness of the Proposed Rates, including the proposed mechanical-only subscriber rate ($1.50) and play rate ($.0015). Dr. Eisenach's illuminating analysis explains streaming business models and offerings and shows the moving pieces in royalty rate structure and levels, explaining nuances in the impacts of multi-prong rate structures, all the while leveraging royalty data covering the full service industry, ultimately demonstrating how the

---

[13] On the contrary, it is Amazon, Apple and Google who now wield market distorting power by virtue of their size, asymmetry of information and ability to price across markets, even vis-à-vis record companies. As a Service expert economist explained, [redacted]. Moreover, the growing encroach of Big Tech in the streaming market only increases [redacted], reinforcing that all of these label deals reflect rates that are not artificially inflated; to the contrary, they are likely below the rates that would be negotiated in a market without information asymmetry, where informed licensors could bargain over the full surplus being created for these trillion-dollar companies by their works.

Proposed Rates are reasonable and consistent with a variety of benchmarks and actual royalty history.

Benchmarks also support other terms and definitions in the Proposed Rates. Copyright Owners propose changes to several key definitions, including Bundled Subscription Offering, Service Provider Revenue and Offering. The proposed definitions capture important concepts, close loopholes and are comparable to terms that Services have agreed to in free market deals.

C. Competition concerns reinforce the importance of the Proposed Rates

1. The Proposed Rates are business model neutral

The Judges have previously explained the importance of setting rates that are business model neutral. In both *Web IV* and in *Web V*, the Judges rejected a proposed lower royalty rate for simulcasters, finding that "simulcasters and other commercial webcasters compete in the same submarket and therefore should be subject to the same rate. Granting simulcasters differential royalty treatment would distort competition in this submarket, promoting one business model at the expense of others."[14] The Proposed Rates seek to avoid a similar distortion of competition by (1) standardizing rates across interactive offering types; (2) eliminating discount pass-through; and (3) including an alternative per-play rate prong.

To be clear, the Proposed Rates do treat two categories of business models differently in one way. Both free/ad-supported offerings and limited offerings would not be subject to the subscriber rate. This recognizes that free/ad-supported services do not have subscribers. The limited offering category, in turn, accommodates niche streaming services that do not offer the same type of access to songs or meaningfully compete with mainstream streaming services.

[14] *Web V Final Determination*, at 249.

The exclusion of these categories from the subscriber rate makes the per-play rate all the more important.[15] Compulsory rates should not pick winners or put a thumb on the scale for one business model over another. This is particularly inefficient given that the Judges, just like licensors, have far less information than the Services about the purposes and risks of each business model. Dr. Eisenach's industry analysis demonstrates that the Proposed Rates are reasonable for business models across the market. However, such reasonableness across all models is not required, nor should arguments that a particular business model would have more difficulty under standard rates be persuasive. As the Judges have explained, "the statutory rate setting process does not instruct the Judges to protect any particular business model. … Any rate or rate structure set by the Judges can (and likely will) affect different regulated entities somewhat differently."[16]

Ad-supported offerings are a prime example of the pitfalls in picking business model winners. In *Phonorecords III*, Spotify argued at length concerning the need for ad-supported rates that did not have any usage-based rate prong, claiming that this "freemium" business model was essential to industry growth of paid subscriptions. But that turned out not to be the case at all. Apple and Amazon [redacted]. The freemium model is simply not necessary for the industry and does not warrant a discounted rate for ad-supported

---

[15] The existence of a true TCC rate prong does not adequately substitute for a per-play rate prong here. To begin with, sound recording and musical work interests are not always aligned, and there may be situations when it is in the interest of sound recording licensors to allow discounts (for example, if receiving promotional benefits to drive concert or merchandise sales), when such is not in the interest of music publishers or songwriters. Perhaps even more critically, the TCC rate prong will not adequately protect publishers or songwriters where the Service owns the sound recording rights (or the record company itself), a scenario that already exists. *See, e.g.*, COEX-7.81 (Rita Liao, *Tencent Music now has joint labels with all 'big three' record labels*, TechCrunch (Mar. 22, 2021), https://techcrunch.com/2021/03/22/tencent-music-joint-labels-warner/); COEX-7.80 (Tim Ingham, *Apple Just Bought a Company that Acts Like a Record Label. Why?*, Rolling Stone (Jan. 4, 2019), https://www.rollingstone.com/music/music-features/apple-just-bought-a-company-that-acts-like-a-record-label-why-774480/). Thus, while a true TCC prong *can* deliver reasonable royalties where a revenue prong is compromised by revenue diminution, a TCC prong cannot substitute for properly calibrated subscriber and play rates in all instances.

[16] *Web V Final Determination*, at 111.

interactive streaming. This is not to say that a freemium model might not be very important *for Spotify* in its competition for the market. But a discount to help Spotify, or favor a particular competition model, is not reasonable and is not supported by the Board's precedent. Such a discount would not only distort competition to subsidize Spotify's competition for the market through its ad-supported offering, but it would unreasonably do so by taking money from songwriters and music publishers. That unreasonableness is particularly egregious as a diversified Spotify is now using ad-supported music to capture users and convert them *not* to paid music subscriptions, but to podcast listeners, so as to generate revenues in its podcast business that are not shared with copyright owners.

Removing discount pass-through is another aspect of business model neutrality. In the Services' competition for market share and quest to acquire high "lifetime value" customers, each Service may seek the upper hand over its competitors—or seek to keep up with other Services—using different promotions or discounts. Compulsory rates should not pick some of these strategies as winners, and certainly should not take song royalties from copyright owners and give them back to a Service as a reward for choosing a particular business strategy.

2. <u>The Proposed Rates protect against discount pass-through that misallocates risk, fosters market failure and is inconsistent with the rate standard</u>

One principle behind the Proposed Rates is that streaming services should not be enabled to shift the cost of their aggressive discounting and competition for the streaming market onto copyright owners through discounted royalties. Compulsory rates and terms that allow streaming services to pass consumer discounts through to copyright owners in the form of lower royalties impede effective competition and are not consistent with the rate standard. Forcing songwriters and music publishers to underwrite discounted streaming plans leads to moral hazard problems, adverse selection, and ultimately, market failure. When discount strategies are passed through as lower royalties, the streaming service is taking risk but is not internalizing the downsides. This is particularly problematic as it is the Service that has the better information on the likely effects, risks and rewards.

Further, a licensor in the free market would not be expected to agree to open-ended discount pass-through, particular when on the short end of information. Free market licensors can assess discount proposals on a case-by-case basis. Some bundles might be approved, but many are not. Some promotions and discounts may be allowed, but many are not. Moreover, free market deals are usually for terms much shorter than five years, and allow reassessment on any approvals, which may be retracted or modified.

The compulsory rate cannot capture individual cases where discounts may or may not be appropriate as it is set for five years. The rates set in this proceeding must capture what a willing buyer and a willing seller would agree to for a license *with those limitations*. The Proposed Rates properly reflect that discount pass-through is not consistent with the rate standard, both as to what a willing seller would agree to and as to what is more consistent with effective competition free of market failure.

3. The Proposed Rates protect against the Services' exploitation of information asymmetry and anticompetitive behavior

The Judges explained in *Web V* how informational asymmetry impedes effective competition and leads to market failure.[17] The current streaming market suffers from profound asymmetry of information, dominated by companies that even Congress and federal regulators struggle to understand.[18] Professor Watt examines the application of Nash bargaining analysis to

[17] *Web V Final Determination*, at 207 n. 287.

[18] *See, e.g.*, House Report on Digital Markets, at 15, 43, 207-08, 213, 225-26, 274-75, 283-84 (discussing information asymmetry problems involving Google and Amazon's superior access to data); COEX-9.1 (Adrianne Jeffries, *To*

assess the impact of the compulsory license on bargaining between streaming services and record companies, where parallel income is earned by the services due to the operation of interactive streaming, but is not known to the record companies due to information asymmetry nor it is included in the revenue sharing pool. His report also shows the dramatic effect of the information asymmetry on negotiated royalty rates, and the importance of addressing this very serious concern through the Proposed Rates.

Head Off Regulators, Google Makes Certain Words Taboo, MarkUp (Aug. 7, 2020), https://themarkup.org/google-the-giant/2020/08/07/google-documents-show-taboo-words-antitrust) (noting internal Google documents coach employees to avoid words such as "market," "barriers to entry," and "network effects").

V. Witnesses presenting written direct testimony

Eleven fact witnesses and four expert witnesses testify in support of the Proposed Rates, providing the evidence, economics and inescapable market realities that underlie and drive the Proposed Rates. In addition, Copyright Owners designate records and testimony that were offered by a fact witnesses and six expert witnesses in *Phonorecords III*. This designated testimony remains relevant and insightful, and Copyright Owners believe will assist the Judges in assessing the issues and the Proposed Rates and Terms.

These witnesses, with a brief overview of selected portions of their testimony, are as follows:

A. Songwriter witnesses

1. Steve Bogard

Steve Bogard has been a successful professional songwriter for over 50 years, writing many number one hits and acclaimed songs. He is also deeply connected to the larger songwriting community and has unparalleled insights into the songwriting profession. He is President of the Board of NSAI and serves on the board of the Nashville Songwriters Hall of Fame Foundation. He is a former Board Member of the Country Music Association and the Academy of Country Music, and has served in numerous other roles in industry associations and community activities.

Mr. Bogard provided testimony in the *Phonorecords III* proceeding and returns to provide an update on the current state of the songwriting industry. While describing the songwriting community's optimism following the *Phonorecords III* decision, Mr. Bogard provides a songwriter's view on the stark reality that the increase in royalty rates portended by the Judges in *Phonorecords III* never materialized. Mr. Bogard then describes the continued struggle songwriters face and the real risks to the profession from sustained low rates. He describes the frustration that songwriters feel at having no control over the use of their works and at watching the devaluation of music in the marketplace in the service of giant technology companies' business strategies. He explains that professional songwriters are being forced to take additional jobs because they can no longer support themselves and their families. Mr. Bogard also explains how songwriting is a labor-intensive profession that requires commitment and enough compensation to have space to work and create; without it, the craft of songwriting deteriorates. Mr. Bogard urges a substantial improvement in the rates and terms to ensure that songwriters are compensated reasonably and are able to continue to advance the profession.

2. Jamie Floyd

Jamie Floyd is a successful 24-year veteran songwriter. She has written songs on award-winning albums, has had many of her songs recorded by well-respected artists, and has also been sought out to write songs for television and movies. Ms. Floyd explains that despite critical acclaim and commercial success, she has been forced to spend a large part of her career also working as a waitress to sustain her livelihood. Ms. Floyd reinforces the commitment and effort required to create quality songs, and the hardships of simultaneously being a full-time waitress and full-time songwriter, the sacrifices that come with it, and the financial instability she experiences every single day. She will explain that financial instability stems in part from interactive streaming royalty rates, where mechanical royalties paid by the Services are a "joke." Ms. Floyd advocates for an improvement in royalty rates and terms, and fears for the future of the songwriting industry if change does not come.

3. Angela Hunte

Angela Hunte is a Grammy-winning songwriter who has penned acclaimed pop and hip hop hits, including the New York City modern anthem "Empire State of Mind." Ms. Hunte explains that, despite critical and commercial success, she had to move her family out of the city whose anthem she wrote because the cost of living was too high and the streaming royalty rates were just too low to support her. She discusses the effects of streaming royalty rates on the songwriting industry, including how she had to leave songwriting to keep the lights on in her house for her family. Ms. Hunte explains songwriting and its demand of tireless effort to achieve success. Ms. Hunte urges the Board to increase compulsory rates and to consider their importance in order to maintain communities and continue to provide songs that bring people together.

4. <u>Autumn Rowe</u>

Autumn Rowe is a songwriter, vocal coach, singer, producer, mentor, activist, educator and DJ. Ms. Rowe discusses her upbringing in the South Bronx and her struggles just to get her foot in the door of the songwriting industry as a minority woman. While Ms. Rowe started her career as a songwriter, she has constantly had to diversify her skillset and take on new roles within the music industry because songwriting rates are simply not enough on their own. Despite her songwriting success, Ms. Rowe has had to work tirelessly in these alternative jobs to make ends meet. She explains that this struggle is in large part due to the low royalty rates paid by the Services, which undervalue songwriters and have made it challenging for songwriters to make a living. Ms. Rowe is hopeful that the outcome of this proceeding will set royalties on a better track and worries what will happen to the industry if it does not.

5. <u>Jimmy Yeary</u>

Jimmy Yeary has been a professional songwriter for over 25 years. He is a Grammy-nominated songwriter with acclaimed and number one hits. Mr. Yeary explains that the current mechanical rate structure for interactive streaming grossly underpays songwriters, making it difficult for songwriters to earn a decent living. As a result, after decades of devoting his entire career to songwriting and despite continuing to write valuable and hit songs, he has been forced to take up additional work as a public speaker to support his family. If the rates do not drastically improve over the next five years, Mr. Yeary will have no choice but to make a complete career change. Mr. Yeary also explains the pressure he and other songwriters feel to write radio singles (to earn more in public performance royalties) and how this pressure is greatly impacting the craft of songwriting and forcing songwriters to abandon great songs in the making.

B. Music publisher witnesses: Business and Licensing

Three music publisher executives testify about the pivotal role that music publishers play in the creation and dissemination of musical works, and the significant value they provide to streaming services that are subject to the Section 115 compulsory license in the United States, as well as other digital streaming services and their users. They discuss weaknesses in both the *Phonorecords II* and *Phonorecords III* rate structures that have permitted services eligible for the compulsory license, and in particular the Services here in this proceeding, to use copyright owners' music to subsidize their long-term customer acquisition strategies and to sell other products and services. They discuss and summarize rates and terms obtained in direct licenses that they have entered into with the Service participants and other Section 115-eligible services, with digital music services for similar rights that are not subject to the compulsory license and that were therefore negotiated between a willing seller and a willing buyer in the free market, and the import of these various categories of agreements. And they demonstrate that Copyright Owners' proposed rates and terms are consistent with rates and terms that would be negotiated between willing sellers and willing buyers in a market unconstrained by the statutory compulsory license.

1. Peter S. Brodsky

Peter S. Brodsky is Executive Vice President, Business and Legal Affairs at Sony Music Publishing, formerly Sony/ATV Music Publishing ("SMP"). In addition to the issues identified above, Mr. Brodsky discusses why the *Phonorecords III* rates should be the starting point for determining the rates for the *Phonorecords IV* period, the willing buyer/willing seller standard, effects of Services' discounting strategies, the Services' lack of transparency in their reporting and in the revenue actually earned by Services from their use of music, and the need to limit the duration of voluntary deals in the rapidly-changing digital music market.

2. Timothy Cohan

Timothy Cohan is Chief Counsel, peermusic. Mr. Cohan discusses several of the issues identified above, including the experience in discovering, developing and supporting songwriters, from the perspective of an independent music publisher. Mr. Cohan also testifies that songwriters, including singer-songwriters, are increasingly looking to music publishers—and particularly independent music publishers—for the financial support that record labels used to provide. Mr. Cohan also discusses the considerable risk and various costs and expenses incurred by peermusic in fulfilling its role described above, including the technological contributions and investments that it has made. Mr. Cohan also discusses the accounting practices of one Service Participant with respect to bundled offerings.

3. David Kokakis

David Kokakis is Chief Counsel, Universal Music Publishing Group ("UMPG"). In addition to the issues identified above, Mr. Kokakis demonstrates with a real-world example how the Services are not engaging in price discrimination to increase streaming music product revenues that are shared with songwriters and publishers, but rather have their sights on capturing long-term customer value across their enterprises.

C. Music publisher witnesses: Financial

Copyright Owners will also present three music publisher financial witnesses from SMP, UMPG and Warner Chappell Music, Inc. ("Warner Chappell"). These witnesses testify to and document the financial investments made by music publishers that are indispensable to the continuity of the creation of new music and to the administration of music rights around the world. The evidence presented by these witnesses will detail the material financial risks associated with the investment made by publishers in identifying, signing and supporting the songwriters of the future as well as established songwriters, whose current songs generate the income received and retained by music publishers (known as their net publishers' share) necessary to financially support the publishers' administrative infrastructure and make investments in new songwriters. These witnesses will detail all of the costs borne by music publishers in centralizing the licensing of music, in collecting and distributing royalty income for their songwriters, and in enforcing and protecting the copyrights in songs created by songwriters (expenses which cannot be sustained by even the most successful songwriters). These music publishing financial witnesses will provide a detailed analysis of the income publishers receive from various sources, including interactive streaming, conclusively demonstrating that not only has interactive streaming growth substituted for, rather than promoted, other streams of income music publishers and writers previously received—specifically including mechanical income from the sale of physical recordings and digital downloads—[redacted].

These witnesses will also debunk the storyline, repeatedly promoted by the streaming services, that the inadequacy of the income received by songwriters from the streaming services is supposedly due to the fact that music publishers are taking too much of the interactive streaming dollar. In fact, the hard data shows that music publishers are receiving and retaining [redacted] cents of every dollar in streaming income while the songwriters are receiving between [redacted] cents of every dollar. And music publishers use the [redacted] cents of interactive streaming royalty dollars that they receive and retain to pay for all of the administrative services they supply as well as to fund the advances to new and existing songwriters. The inadequacy of the income received by songwriters from streaming is due to the inadequacy of the royalty rates and payments of the streaming services, not due to the share of income received and retained by publishers.

1. JW Beekman

JW Beekman is Global Chief Financial Officer of UMPG. Mr. Beekman's testimony documents the financial investment that UMPG, and music publishers in general, make in acquiring and maintaining existing song catalogs and supporting both established songwriters and new writers with financial advances. Mr. Beekman's testimony explains how the existing catalogs provide the revenue for UMPG to provide all of the services necessary to administer musical works on behalf of songwriters, including the A&R (Artists & Repertoire) function, which assists with songwriter development, the copyright and administration function, the digital, synchronization and mechanical licensing of the catalog on a worldwide basis and the royalty and tracking function provided to assure that songwriters are properly paid by the tens of thousands of licensees of the musical works. Mr. Beekman's testimony shows the high level of financial risk assumed by UMPG in providing advances to new and unproven writers as well as the increasing risk in making advances even to established writers. Mr. Beekman's testimony documents [redacted] from the sale of physical recordings and digital downloads as interactive streaming has substituted for the sale of recordings and digital downloads, [redacted]. In fact, as Mr. Beekman documents, [redacted], UMPG and its songwriters [redacted]. In fact, [redacted] Mr. Beekman also shows that the [redacted] mechanical income received by UMPG and its songwriters in 2009 from physical recordings and digital downloads was generated by a catalogue that was [redacted]. Mr. Beekman also shows that when one deducts the [redacted] mechanical income from physical recordings and digital downloads from the income produced by interactive streaming, in most years since 2016, songwriters made, on average, [redacted]. Mr. Beekman also explains the competitive landscape in acquiring and retaining rights in existing musical works, addressing the role of purely financial entities who, in a low interest environment, have [redacted]. This is, in part because many of the financial entities are not "full-service" publishers and do not incur the costs of searching, signing and paying advances to unknown writers and or the very large infrastructure and personnel costs of providing all of the administration services provided by full-service publishers like UMPG. Instead, these financial entities pay a fee to full-service publishers to perform such services. Mr. Beekman also demonstrates that the share of interactive streaming income received and retained by UMPG, contrary to the assertions made by the streaming services industry in an attempt to deflect from low royalties, is now approximately [redacted], meaning that songwriters are receiving and retaining some [redacted] of every dollar in interactive streaming income UMPG receives from the streaming services.

2. Thomas Kelly

Thomas Kelly is Global Chief Financial Officer of SMP. Mr. Kelly's testimony addresses, along with issues identified above, how the change from an ownership model of music to an on-demand steaming model has resulted [redacted] in mechanical income from the sale of physical recordings and digital downloads that [redacted] in mechanical income from interactive streaming. This is occurring at the same time that synchronization income from the blanket licensing of audio/visual streaming platforms has [redacted]. Mr. Kelly's testimony also shows that not only has interactive streaming obliterated the sale of physical recordings and digital downloads but it is also now having a negative impact on performance income from other sources, such as terrestrial radio. Mr. Kelly's testimony further shows that average mechanical income of songwriters, as a result of [redacted] in mechanical income from physical recordings and digital downloads, even with [redacted] in mechanical income [redacted] of interactive streaming, is [redacted]. Mr. Kelly's testimony also explains that SMP is retaining only about [redacted] of total interactive streaming income from the streaming services, with songwriters receiving about [redacted] of that income. Mr. Kelly's testimony also documents the growth in the number of songwriters (or their heirs) who receive interactive streaming income and the growth in the number of songs provided to the streaming services that share in the income. Finally, Mr. Kelly's testimony shows [redacted] SMP's costs to administer the catalogue of songs licensed to interactive streaming services, as well as [redacted] advances being paid by music publishers (both to new songwriters with no earnings history and to established songwriters). This income is necessary to pay for those very administrative services for songwriters and to pay for the advance, which enable songwriters to focus their efforts on songwriting. Lastly, Mr. Kelly also discusses substantial risks of such advances, as reflected by [redacted] of such advances.

3. Annette Yocum

Annette Yocum is Vice President of Finance and Controller of Warner Chappell. Ms. Yocum's testimony addresses the financial costs incurred by music publishers in identifying, developing and supporting new and existing songwriters through the payment of advances. Ms. Yocum demonstrates the financial risks assumed by Warner Chappell in investing in unknown songwriters to create the music of the future. Ms. Yocum testifies to [redacted] costs and risks undertaken by Warner Chappell in acquiring and retaining rights in existing catalogues of musical works, which are necessary to retain the hoped-for stream of income to support all of the administrative services provided by Warner Chappell on behalf of songwriters, including such services as A&R, legal, digital licensing, mechanical licensing, synch licensing and the administration of royalties. Ms. Yocum documents the [redacted] of advance payment extended by Warner Chappell over the past four years and [redacted] those advances. Ms. Yocum's testimony also shows that [redacted] mechanical income from the sale of physical recordings and digital downloads, just over the past four years, [redacted] mechanical income from streaming, resulting in [redacted]

[redacted] mechanical income as streaming has substituted for and replaced the sale of physical records and digital downloads. Ms. Yocum's testimony also shows, like that of Mr. Beekman, [redacted], both the publishers' share and the songwriters' share, Warner Chappell and its songwriters [redacted] over a decade ago. Ms. Yocum's testimony also shows that at the same time that interactive streaming has reduced songwriter income, Warner Chappell's own net publisher share of the interactive streaming income has [redacted] to [redacted], meaning that songwriters are receiving over [redacted] out of every dollar in streaming income. Further, Ms. Yocum provides an analysis of Warner Chappell's performance income from all sources and shows that [redacted] over the past four years, it [redacted] from other sources.

D. Expert witnesses

1. Jeffrey A. Eisenach, PhD.

Jeffrey A. Eisenach is a Managing Director and Co-Chair of the Communications, Media and Internet Practice at NERA Economic Consulting. Dr. Eisenach testifies concerning the economic basis for Copyright Owners' Proposed Rates. Dr. Eisenach first examines the institutional and economic context for this rate proceeding. He discusses the new willing buyer/willing seller rate standard for determining compulsory mechanical royalty rates and terms, the compulsory rates in practice, and the effect of the compulsory rate on the marketplace. Dr. Eisenach then discusses the competitive dynamics of the streaming industry, providing an overview of the entire compulsory licensee market, as well as explaining the specific dynamics of the Services participating in this proceeding. Dr. Eisenach then surveys comparable benchmarks, looking at marketplace deals involving sound recording and musical works licenses, identifying specific compelling benchmarks within that range, and evaluating and applying adjustments to align the benchmark market with the hypothetical marketplace for mechanical rights at issue in this proceeding. Dr. Eisenach also takes actual streaming usage and royalty pool data for all of the Services, as well as the additional compulsory licensees in the market, and demonstrates the impact of the Proposed Rates using this actual data. Dr. Eisenach discusses how the Proposed Rates fulfill the rate standard, and discusses the economic reasonableness of definitions that accompany the rate structure and rate levels. Dr. Eisenach concludes that the Proposed Rates are conservative, reasonable and fulfill the statutory rate standard.

2. Robin Flynn

Robin Flynn is a former Managing Director of Research and Senior Analyst for Kagan, an offering of S&P Global Market Intelligence, with extensive experience in analyzing, reporting on, and performing valuations of companies in the media industry. Ms. Flynn testifies concerning the history, competitive dynamics and business models in the streaming marketplace dominated by Amazon, Apple, Google and Spotify. Ms. Flynn explains the rise of streaming offerings, the change in streaming consumer products and the evolution of streaming business models. Ms. Flynn explains how streaming evolved into a marketplace of highly substitutable products, where streaming services are not competing for exclusive content. Ms. Flynn places this marketplace into the context of the giant technology companies that comprise the majority of the market and explains Spotify's focus on diversification to keep up with its Big Tech competitors. Ms. Flynn details the history of underpricing in the streaming industry; the ongoing competition for the streaming market and perhaps more importantly, for the valuable music streaming customer; and the business model of the dominant streaming companies that focuses on gains in product lines outside of streaming and ecosystem growth for which music is a customer acquisition tool.

Ms. Flynn explains the eyepopping economic size of the complementary product lines of the dominant streaming services, connecting the dots on the Service business models that sacrifice music streaming revenues for gains in other business lines.

3. <u>Professor Daniel Spulber</u>

Daniel F. Spulber is the Elinor Hobbs Distinguished Professor of International Business and Professor of Strategy at the Kellogg School of Management, Northwestern University. Professor Spulber testifies concerning economic principles relevant to the Proposed Rates and the appropriate rate structure to implement. Professor Spulber explains the relevance of information asymmetry and misallocation of risk under a willing buyer/willing seller rate standard, and how these concerns undermine effective competition and counsel on appropriate rate structures, concluding that the proposed rate structure is appropriate for the interactive streaming market.

4. <u>Professor Richard Watt</u>

Richard Watt is Professor of Economics in the Department of Economics and Finance at the University of Canterbury (New Zealand). Professor Watt testifies to the economic basis for the Proposed Rates. He provides a robust Shapley analysis to assess the proper division of surplus between the services and copyright owners. Professor Watt explains the aptness of the Shapley analysis under the new rate standard, analyzes empirical financial data and addresses multiple modeling assumptions, showing that all reasonable modeling assumptions lead to the conclusion that mechanical royalties should increase. He also explains the impact of information asymmetry on surplus division and models the effects of removing the Services' asymmetrical information on reasonable royalty rates. Professor Watt also provides a Nash bargaining solution to analyze the effect of parallel income earned by the Services due to the operation of interactive streaming, but which is not included in the revenue sharing pool. Professor Watt concludes that the Proposed Rates are extremely conservative and meet the rate standard.

E. Designated fact witness record and testimony from *Phonorecords III*

1. David Israelite

David Israelite is the President and Chief Executive Officer of the NMPA. In his *Phonorecords III* testimony, Mr. Israelite discussed the tremendous change in the music industry brought about by the growth of interactive streaming and limited download services, and the resulting challenges to obtain a fair share for music publishers and songwriters of the enormous value they contribute to those services. Mr. Israelite also testified concerning the 2008 *Phonorecords I* and *Phonorecords II* settlement and his personal involvement in both, including why neither those settlements nor the 2016 settlement of the Subpart A rates are appropriate "benchmarks."

F. Designated expert witness record testimony from *Phonorecords III*

1. Christopher Barry

Christopher Barry was a partner in PricewaterhouseCooper's Forensic Services practice and a Certified Public Accountant with more than 35 years of financial and forensic accounting experience when he submitted testimony on behalf of the Copyright Owners in *Phonorecords III*. Mr. Barry testified that reliance on GAAP financial statements is only a starting point for evaluating interactive streaming services' financial condition and results of operation. In order to meaningfully evaluate the business of the company in question, its financial statements need to be considered in the context of factors such as the economy, competition, growth stage of the company, access to financing, prospective strategic plans and tactical implementation of such plans. Additionally Mr. Barry analyzed statements made by Amazon, Google, Pandora and

Spotify and their experts concerning their "profitability" and identified instances in which the Services' interactive streaming plans provided significant cross-selling benefits to their other business lines and ecosystems, benefits that have only expanded since *Phonorecords III*.

2. Jeffrey A. Eisenach

The Copyright Owners are designating the *Phonorecords III* testimony of Dr. Jeffrey A. Eisenach, who is also testifying on behalf of the Copyright Owners in this proceeding. In the *Phonorecords III* proceeding, Dr. Eisenach surveyed comparable benchmarks involving sound recording and musical works licenses, including an evaluation of market performance and relevant contextual information. He then examined markets in which both sound recording and musical works rights are required, establishing upper and lower bounds of this relative value. Dr. Eisenach finally analyzed historical musical works royalty data with the benefit of his survey and analysis, which informed his opinion of reasonable mechanical royalty rates that supported the Copyright Owners' proposed rates and terms. In his rebuttal testimony in *Phonorecords III*, Dr. Eisenach explained why the Services' experts' reliance on the 2008 and 2012 settlements in *Phonorecords I* and *II* proceedings and direct licenses negotiated under the show of the statutory Section 115 license were flawed and inappropriate.

3. Joshua Gans

Dr. Joshua S. Gans is Professor of Strategic Management and holder of the Jeffrey S. Skoll Chair of Technical Innovation and Entrepreneurship at the Rotman School of Management, University of Toronto. In his *Phonorecords III* testimony, Dr. Gans assessed how royalties for musical works have been historically depressed through compulsory licensing and discusses how appropriate regulatory pricing can be accomplished through analysis of a hypothetical market without compulsory licensing to determine reasonable rates. To that end, after evaluating economic principals and regulatory pricing rules as guides for setting mechanical royalty rates, Dr. Gans conducted a Shapley value analysis to conclude that the then-current royalty rates were below estimated rates in a hypothetical market without compulsory licensing.

In his *Phonorecords III* rebuttal testimony, Dr. Gans recalculated the model employed by Spotify's expert, Dr. Leslie Marx, using a more robust, realistic and accurate set of assumptions, the results of which converged on the values identified in Dr. Gans's original Shapley value analysis. Dr. Gans also testified about the Services': (1) historical and projected revenue growth; (2) [redacted]; (3) overall company value from interactive streaming recognized in their complementary product lines; and (4) and decline of global revenue generated by distributions channels other than streaming.

4. Mark Rysman

Dr. Rysman is a Professor of Economics at Boston University, where he teaches courses on industrial organization, econometrics, antitrust, and regulation. In *Phonorecords III*, Dr. Rysman explained how numerous economic features of the music streaming market lead streaming services to defer and displace revenue and profits. Specifically, he explained that Apple, Amazon and Google use music to bring consumers into their ecosystems so that they can profit from sales on their complementary product lines. He also explained that Amazon's and Spotify's music businesses are valued far above what their profitability would imply, as they have been focused on growth at the expense of short-term profitability and have benefitted from such an approach by increasing their respective market caps.

5. Jim Timmins

Mr. Timmins is the Managing Director of Teknos Associates LLC, a business valuation firm, whose then-35-year advisory and transactional career also included experience in venture capital and investment banking. In his *Phonorecords III* testimony, Mr. Timmins testified in rebuttal to Mr. Pakman's testimony concerning the state of the interactive streaming market. Specifically, Mr. Timmins provided facts showing that the digital music market is prospering, as evidenced by the increasing number of streaming music subscribers and companies that have entered the market, capital investments in the industry, and indirect benefits that flow to companies in this sector.

6. Richard Watt

The Copyright Owners are designating the *Phonorecords III* testimony of Dr. Watt, who is also testifying on behalf of the Copyright Owners in this proceeding. In *Phonorecords III*, Dr. Watt analyzed the Shapley analysis put forth by Spotify's expert witness, Dr. Leslie Marx, and demonstrated that, after correcting for methodological and data flaws in such analysis, the actual value of a fair and reasonable royalty rate is substantially higher than the then-present rates.

Dated: October 13, 2021

Respectfully submitted,

PRYOR CASHMAN LLP

By: /s/ Benjamin K. Semel
Benjamin K. Semel (N.Y. Bar No. 2963445)
Frank P. Scibilia (N.Y. Bar No. 2762466)
Donald S. Zakarin (N.Y. Bar No. 1545383)

7 Times Square
New York, New York 10036
Telephone: (212) 421-4100
bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com

Counsel for Copyright Owners

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	Docket No. 21–CRB–0001–PR (2023–2027)

WRITTEN DIRECT STATEMENT OF COPYRIGHT OWNERS

PROPOSED RATES AND TERMS

(as corrected by the Notice of Errata dated October 25, 2021)

Table of Contents

Pursuant to 37 C.F.R. § 351.4(b)(3), National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners") propose the rates and terms set forth herein (the "Rate Proposal") for making and distributing phonorecords under 17 U.S.C. § 115 during the period January 1, 2023 through December 31, 2027. Pursuant to 37 C.F.R. § 351.4(b)(3), Copyright Owners reserve the right to revise their proposed rates and terms at any time during the proceeding up to, and including, the filing of their proposed findings of fact and conclusions of law.

I. <u>ROYALTY RATES FOR PHYSICAL PHONORECORDS, PERMANENT DOWNLOADS AND RINGTONES</u>

On or about May 18, 2021, Copyright Owners reached a settlement with Sony Music Entertainment ("SME"), UMG Recordings, Inc. ("UMG"), and Warner Music Group Corp. ("WMG") (SME, UMG, and WMG, together, the "Joint Record Company Participants") with respect to the rates and terms for physical phonorecords, Permanent Downloads, Ringtones, and Music Bundles (such configurations, "Subpart B Configurations," and such settlement, the "Subpart B Settlement"). On or about May 25, 2021, the parties to the Subpart B Settlement moved the Copyright Royalty Judges ("CRJs") to adopt the rates and terms contained in the Subpart B Settlement as the rates and terms for all licensees of Subpart B Configurations (eCRB Docket No. 25288, the "Subpart B Motion"). On June 25, 2021, the CRJs published the Subpart B Settlement in the Federal Register for comment. *See* 86 Fed. Reg. 33601.

For the reasons set forth in the Subpart B Motion and in the Copyright Owners' and Joint Record Company Participants' Comments in Further Support of the Settlement of Statutory Rates and Terms for Subpart B Configurations (eCRB Docket No. 25577), Copyright Owners propose the rates and terms contained in the Subpart B Settlement as the rates and terms to be adopted by the CRJs in this Proceeding for all Subpart B Configurations made by all licensees. Copyright Owners (representing the vast majority of licensors of mechanical rights for Subpart B Configurations) and Joint Record Company Participants (representing the vast majority of licensees of those rights) have all expressed support for and, other than Mr. George Johnson, no participant opposes the adoption of the Subpart B Settlement as the rates and terms for all licensees of Subpart B Configurations. Copyright Owners respectfully request that Judges adopt the Subpart B Settlement as the rates and terms for all licensees of Subpart B Configurations.

II. ROYALTY RATES AND TERMS FOR INTERACTIVE STREAMS AND LIMITED DOWNLOADS

Copyright Owners' proposal maintains much of the rate structure and terms adopted in the *Phonorecords III* Final Determination, 84 Fed. Reg. 1918 (February 5, 2019), while also making important changes to the rate structure, rate levels and definitions. The core changes address significant barriers to the delivery of reasonable mechanical royalties under the new willing buyer/willing seller rate standard, barriers that have become more glaring after five more years of tectonic change in the streaming market. An overview of the proposed changes is broken down into four sections: (A) rate structure; (B) rate levels; (C) rate calculation; and (D) definitions. Evidence supporting this Rate Proposal, as well as addressing the specific rates, terms and definitions, is presented throughout the accompanying testimony and exhibits.

A. Rate structure

In the *Phonorecords III* Final Determination, the Board modified and simplified the outdated 10-category, 79-part rate structure from the *Phonorecords II* settlement. The Board dispensed with multiple rate calculation formulas and terms, and implemented a uniform formula to calculate the mechanical royalty pool, which is the greater of these three rate prongs[1]:

- Uniform percentage of service provider revenue
- Uniform percentage of TCC
- Subscriber rate, where applicable

The Rate Proposal continues this basic structure, while adding a much-needed per-Play rate prong.

1. Maintaining uniform revenue and true TCC rate prongs

The Rate Proposal continues the Board's establishment in *Phonorecords III* of uniform revenue and true TCC rate prongs, which are calculated "all-in" or net of performance royalty payments. *See Phonorecords III* Final Determination, 84 Fed. Reg. at 1935 (noting that the simplified structure "reduces the Rube-Goldberg-esque complexity and impenetrability" and avoids "the potential for confusion and conflict as new service offerings emerge").

With respect to the true TCC[2] rate prong, as Copyright Owners laid out in detail at the *Phonorecords III* hearing and in the *Phonorecords III* remand proceedings (the "Remand"), true

---

[1] The revenue and TCC rate calculations are done net of performance royalty payments, while the Subscriber rate is not.

[2] As in the *Phonorecords III* remand proceeding, Copyright Owners use the term "true TCC" to describe what is also described as an "uncapped TCC." The language of these proceedings has generally referred to the placement of a TCC prong into a lesser-of calculation with a per-subscriber prong as a "capped TCC prong," while referring to a true, freestanding TCC prong as an "uncapped TCC prong." While acknowledging the custom of using this shorthand term, Copyright Owners believe it is misleading. The previous so-called "capped TCC" was simply *not* a TCC; it was a per-subscriber rate. The protection against revenue deferral that a TCC prong provides does not exist to the extent the TCC is substituted with a lower per-subscriber rate. Further, a true, freestanding TCC (which Copyright Owners shall refer to herein as a "true TCC") is necessarily capped, namely limited, to a small percentage of the consideration provided for related sound recording rights. Thus, the nomenclature of an "uncapped TCC" is misleading because it incorrectly implies that a TCC prong of some sort remains after it has been eliminated in favor of a per-subscriber rate, and it incorrectly implies that a true TCC is an uncontrolled royalty, when in fact it is tied and limited by sound recording rates constrained by the market (and that history has shown are stable rates).

TCC rate prongs have existed since *Phonorecords I* and serve an important role in protecting against diminution of royalties due to Service business models—both existing models and new models that may not even be anticipated as yet, but that may arise over the five-year rate period.

2. *Maintaining a per-Subscriber mechanical rate prong with an exception for Limited Offerings, but making the rate uniform*

The Rate Proposal continues the Subscriber mechanical-only rate prong. In the *Phonorecords III* Final Determination, the Board maintained multiple rates for Offerings that allow: (1) portable device access; (2) only nonportable device access; and (3) only nonportable device access through a live Internet connection (in other words, without limited downloads). There is no need or justification any longer for separate Subscriber rates that favor nonportable offerings, which compete directly with other offerings. To begin with, this separate category is largely obsolete. Only one Service (Amazon) currently offers a nonportable plan, and it is linked to purchase of a hardware device from that Service.[3] Copyright Owners therefore propose a uniform Subscriber rate that would apply to Offerings accessible from portable and nonportable devices alike.

Copyright Owners do believe that there is a submarket of limited, niche products that may have lower access value and be expected to correlate to lower usage, and that these Limited Offerings can be excepted from the Subscriber rate. (The scope of this limited offering exception is defined and discussed in the Definitions section below.) As a result, the proposed uniform

[3] Notably, the meaning of nonportable in the market has also fundamentally changed. At the time that separate Subscriber rates were conceived for nonportable offerings, nonportable meant use through a desktop computer (the only nonportable plan that a Service offered at the time of *Phonorecords III* was Spotify's "desktop only" offering). Today, no nonportable plans under the compulsory license relate to desktop computer access only. Rather, the only current nonportable plan involves connecting to dedicated audio equipment sold by the streaming service.

Subscriber rate would not apply to Limited Offerings as defined (and would not apply to free/ad-supported Offerings which do not have Subscribers).

3. *Establishing a uniform per-Play mechanical rate prong*

The Rate Proposal also establishes a uniform per-Play rate prong (the "Play rate prong"). The Play rate prong would apply to all Offerings. While Limited Offerings are excepted from the Subscriber rate, they are not excepted from the Play rate prong. The nature of Limited Offerings could be expected to generally correspond to fewer Plays per subscriber, and a Limited Offering that instead generated usage per Subscriber at a higher level should not be excepted from paying royalties on that usage. The Play rate prong would also apply to free/ad-supported Offerings. Currently of the five Service participants in this proceeding, four offer ad-supported Offerings in the U.S., and [redacted]. The streaming service industry [redacted], and of course the Judges set compulsory per-play rates for streaming offerings in each Webcasting proceeding.

A Play rate prong is also the gold standard for capturing the value of a core consumer usage. It is a "usage-based metric" that is "directly tied to the nature of the right being licensed," and is the only prong that can vindicate the "basic notion . . . that the more the rights being licensed are used, the more payments should increase in direct proportion to usage." Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 2005-1 CRB DTRA, 72 FR 24084, 24089 (May 1, 2007) ("*Web II*"). The D.C. Circuit has "validated" the Judges' longstanding preference for usage-based metrics in the context of the penny rate for phonorecord sales, finding "nothing unreasonable" about the Board's view that it "provided 'the most efficient mechanism for capturing the value of the reproduction and distribution rights at issue.'" *Recording Industry Ass'n of America, Inc. v. Librarian of Congress,* 608 F.3d 861, 869-70 (D.C. Cir. 2010) ("*Phonorecords I Appeal*").

4. Eliminating zero rates, with an exception for streaming in connection with music purchases

The promotional offering provisions that have carried over from *Phonorecords II* are from a different era and do not have a proper place in the interactive streaming market. It is not reasonable to continue to compel musical work copyright owners to license their works to streaming services for free, regardless of whether record companies, who have negotiated their rates and terms in the free market, have agreed to such promotion. Record companies may have other motivations for promotions, including to drive revenues from concerts, merchandise sales, sponsorships or other activities that are not shared with musical work copyright owners.

The exception to this rule is limited usage relating to *purchases* of content, for which songwriters and music publishers do receive royalties. The Rate Proposal thus provides for a zero rate for mechanical royalties for only the following limited uses: (1) up to 90-second previews of sound recordings embodying a musical work which are offered to promote the sale of the sound recording (defined below as Promotional Use), and (2) streaming via a Purchased Content Locker Service, where the Service has sold a permanent copy of a sound recording to a consumer and streams that same sound recording to the same consumer for no additional consideration.

B. Rate levels

1. Revenue rate

The Rate Proposal increases the revenue prong rate level to 20 percent. This rate level is consistent with the most suitable free market benchmarks and the royalty history across the entire U.S. compulsory licensee market. Shapley analysis shows the rate to be very conservative and incremental by comparison to rate levels that are to be expected from negotiation between a willing buyer and willing seller, especially an effectively competitive market without asymmetrical information.

2. TCC rate

The Rate Proposal increases the true TCC rate level to 40 percent. This rate level corresponds to the Board's findings concerning the appropriate market ratio between sound recording and musical works rates (2.5:1). Shapley analysis based on recent empirical data and a robust array of modeling shows this ratio to be very conservative.

3. Subscriber rate

The Rate Proposal seeks to bring the current mechanical-only Subscriber rate in line with market agreement benchmarks, setting the rate at $1.50 per Subscriber for the year 2023. This rate level is further corroborated by [redacted], when adjusted by the Board's 2.5:1 market ratio and then reduced by actual performance royalties paid across the U.S. streaming industry. The Subscriber rate would be adjusted annually to reflect changes in the cost of living in the same manner that the Judges adjust the statutory royalty fee for webcasting under Part 380.

4. Play rate

The Rate Proposal establishes a uniform mechanical-only Play rate of $0.0015 per Play. This rate level is also supported by market benchmarks and corroborated by [redacted], when adjusted by the Board's 2.5:1 market ratio and then reduced by actual performance royalties paid across the U.S. streaming industry. Like the Subscriber rate, the Play rate would be adjusted annually to reflect changes in the cost of living in the same manner that the Judges adjust the statutory royalty fee for webcasting under Part 380.

C. <u>Rate calculation</u>

Copyright Owners' Rate Proposal maintains the basic four-step process for calculating and allocating royalty pools for each Offering, while also taking into account the Play rate. Copyright Owners' revisions to the rate calculation regulations are intended primarily to clarify and simplify the explanation of the process.

1. Clarifying the scope of Subpart C

Copyright Owners have proposed to simplify the title of Subpart C to "Subpart C – Eligible Interactive Streams and Eligible Limited Downloads," which accurately and simply captures the subject matter of the Subpart. Similarly, the description of scope in the proposed § 385.20 is clear and concise.

2. Separate pools for each Offering

The Rate Proposal maintains that royalty rate calculations must be calculated separately with respect to each Offering, resulting in a separate payable royalty pool for each Offering during the relevant accounting period. As discussed in detail below, the definition of Offering should also be clarified to leave no doubt that each distinct product offering in the marketplace is a separate Offering for the purpose of royalty rate calculations.

3. Streamlining the rate calculation process

The Rate Proposal maintains a four-step process to calculate the royalty payments for each Offering. Copyright Owners have largely kept the function of 37 C.F.R. § 385.21 the same (with the addition of the Play rate) but have condensed and streamlined the steps:

<u>Step One</u>: This step remains the calculation of the greater of the applicable percentages of Service Provider Revenue and TCC.

<u>Step Two</u>: This step remains the deduction of applicable Performance Royalties. Language in this section concerning what constitutes applicable Performance Royalties has been moved to

the definition of Performance Royalties, as discussed below, in order to make the calculation description clearer.

Step Three: This step remains the determination of the payable royalty pool, which is still the greater of (i) result of Step Two and (ii) the alternative royalty calculation (formerly referred to as the royalty floor).[4] The alternative royalty calculation is now the greater of the Subscriber rate prong and the Play rate prong. For clarity, Copyright Owners moved the details on the alternative royalty pool into Step Three (37 C.F.R. § 385.21(b)(3)(ii)) and deleted the standalone provision on this rate prong (37 C.F.R. § 385.22) that came after the royalty pool calculation provision. This clarifies the process by setting forth all of the royalty pool calculation steps in order in one section.

Step Four:

This step remains the calculation of per-work royalty allocations. The Rate Proposal carries over the existing process while clarifying the explanation through more streamlined language.

The Rate Proposal also retains the Overtime adjustments and Accounting provisions, conforming the Accounting provision to reflect the Mechanical Licensing Collective as the administrator of royalty reporting and distribution under the blanket compulsory license.

[4] Copyright Owners submit that the term "floor," like the term "minima," is a "misnomer; the [mechanical-only Subscriber rate] prong actually serves, as intended, to increase the effective percentage [of revenue] rate paid." Dissenting Opinion of Judge David R. Strickler, *In the Matter of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Docket No. 16—CRB-0003-PR (2018 – 2022) (Nov. 5, 2018) ("Dissent") at 149.

D. Definitions

Copyright Owners propose a number of revisions to the definitions set forth in 37 C.F.R. § 385 Subpart A. Some are critical for delivering reasonable rates, while others clarify, simplify or conform language.

1. Bundled Subscription Offering

The Rate Proposal retains a defined term for Bundled Subscription Offering, but revises it as follows:

> *Bundled Subscription Offering* means a Subscription Offering that is made available to End Users (i) as a combination of two or more marketable products or services where the applicable products or services are offered for a single price that cannot be disaggregated; or (ii) a discounted Subscription Offering that is available only to consumers who have purchased one or more other products or services.

Clause (i) carries over the thrust of the current definition, but clarifies that the products in the bundle must be marketable, that is, "fit to be offered for sale in a market."[5] This ensures that the bundle includes only bona fide products, avoiding phantom "bundles" that contain "products" that do not have real independent value (such as a bundle of interactive streaming with recommendations or artist biographies).

Clause (ii) addresses a glaring loophole that is being exploited in the marketplace, particularly by Amazon. The current definition does not account for bundle models that are sold in consecutive rather than simultaneous transactions. Where one product or service is offered at a discounted price only on condition of the consumer purchasing another product, even if the transactions are consecutive and involve separate prices, the same economic indeterminacy exists, and the protections of the Service Provider Revenue definition for bundles should apply. *See* Final

[5] Marketable, Meriam-Webster.com, https://www.merriam-webster.com/dictionary/marketable (last accessed Oct.12, 2021).

Determination, *In the Matter of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and ''Preexisting'' Subscription Services* (*SDARS III*), 83 Fed. Reg. 65210, 65264 (Dec. 19, 2018) (where there is a revenue rate prong and product revenue "consists of some revenue attributable to the royalty base and other revenue excluded from the royalty base, the economic indeterminacy of the revenue attributable to each bucket creates a measurement problem"). Amazon, for example, offers a discount to Amazon Music Unlimited for subscribers who are already Prime users. If a student pays for Amazon Prime, the student can subscribe to Amazon Music Unlimited for just $0.99 a month—a *90 percent* discount off the streaming subscription when paired with a Prime purchase for many multiples more.[6] If a non-student pays for Prime, Amazon provides three free months of Amazon Music Unlimited, and then a 20 percent discount off the streaming subscription ($7.99/month or $79/year, as compared to $9.99/month if the subscriber does not pay for Prime).[7] This linked-product business model is a bundle, and should be included in the bundle definition and subject to the terms for bundles.

The revised definition is thus necessary to ensure that the rates and terms addressing bundles are applied to the actual bundle product configurations in the market. Without the addition of clause (ii) to the definition, Services could emulate Amazon's manipulation of the bundle definition by tying products together while avoiding having them treated as bundles just by structuring the tied sales as consecutive transactions. To preclude such a strategy, market agreements for interactive streaming between [redacted]

---

[6] *See* COEX-7.62 (Tom Chan, *Amazon Offering 50% Off Prime Membership for Students, Plus Music Streaming from 99 Cents*, Billboard (Aug. 26, 2021) https://www.billboard.com/articles/news/9612348/amazon-prime-student-discount-pricing-offers).

[7] *See* COEX-7.63 (Amazon Music Unlimited FAQ, available at https://www.amazon.com/b?ie=UTF8 &node=15730321011).

[redacted]"[8]

2. *Limited Offering*

As discussed above, Copyright Owners recognize that there is a submarket of limited, niche products that may have lower access value and correlate to lower usage, and that these Limited Offerings can be excepted from the Subscriber rate. However, the current definition of Limited Offering should be clarified as follows:

> *Limited Offering* means a Subscription Offering providing Licensed Activity which meets one of the following criteria –
>
> (1) The Subscriber's ability to choose to listen to particular sound recordings on demand is substantially limited (*e.g.*, the Offering does not allow streams of individual recordings on demand, or streams are rendered only as part of specific, limited programs or playlists);
>
> (2) The catalog of sound recordings available to Subscribers is limited to a particular genre (or subset of related genres);
>
> (3) The Subscription Offering does not make available sound recordings licensed and provided by third-party record companies; or
>
> (4) The Subscription Offering does not, on any day in a calendar month, make more than three million (3,000,000) different sound recordings of musical works available through such Offering.

---

[8] *See* COEX-7.25 [redacted]; COEX-7.26 [redacted].

The proposed definition retains the two general categories of (1) limited functionality and (2) limited catalog, expanding the former and narrowing the latter to better align the categories. With respect to the former, the definition covers Offerings that *substantially limit* on-demand functionality, which is an expansion from the extant definition that requires a complete lack of on-demand functionality. With respect to limited catalog, the proposed definition maintains the category for genre-specific Offerings and adds two additional exceptions. Offerings that do not involve record company content (such as Offerings that depend exclusively upon user-generated or self-produced content) are excepted, as are Offerings with catalogs of less than three million sound recordings.

This definition is a check against ambiguity in the extant "substantially limited" language (*e.g.*, is a service that offers 60 million tracks "substantially limited" compared to a service that offers 70 million tracks?), and better aligns the definition with the market of limited, niche offerings.

3. Offering

Copyright Owners propose the following definition for Offering:

> *Offering* means a product or service offered by a Service Provider providing Licensed Activity. Each such product or service is a distinct Offering if it is: (a) marketed or sold at a different price or with different branding; (b) subject to different End User eligibility requirements; or (c) subject to different terms and conditions of use. Each Bundled Subscription Offering with distinct components is a distinct Offering.

The proposed definition of Offering does not change what Licensed Activity falls under Offerings subject to these rates, but merely seeks to clarify the line *between* Offerings. This line is important for ensuring transparency and accuracy in royalty pool calculations and reporting. Despite the longstanding language in the regulations providing that a service must calculate the royalty pool separately for separate Offerings, the Services generally do <u>not</u> report their Offerings separately.

For example, [redacted].[10] [redacted]

[redacted] in connection with its Motion to Strike Copyright Owners' Expert Testimony, dated July 27, 2021, eCRB Docket No. 25540, filed in the Remand. There, Spotify argued that combining these offerings together "mask[s] what has actually happened," ignoring that Spotify is the one engages in that very obfuscation in violation of the regulation, and asserting that:

> Dr. Eisenach inappropriately combines categories of offerings in an effort to mask what has actually happened over time. For example, Dr. Eisenach claims that for [redacted]

---

[9] [redacted]. *See* COEX-7.67 ([redacted]).

[10] *See* COEX-7.64 (Spotify Pick Your Premium); *compare* COEX-7.65 (Spotify Premium Promotional Odder Terms) *with* COEX-7.66 (Spotify Premium Student Tier 3 Month Introductory Trial Offer Terms and Conditions).

> [redacted].[11] (emphasis added)

As is evident from the emphasized language, [redacted]. Indeed, Spotify incorrectly and hypocritically accuses Dr. Eisenach of deception in not separating them. [redacted] When Copyright Owners requested a breakdown of information on family and student plans in discovery in the Remand, Spotify refused to provide it.[12] Dr. Eisenach noted in his rebuttal report in the Remand [redacted][13]

The revised definition will also help ensure consistency among the Services in royalty pool calculations and reporting, as some Services do a better job of reporting separate Offerings separately. [redacted]

---

[11] Motion to Strike Copyright Owners' Expert Testimony, *In the Matter of Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, eCRB Docket No. 25540 (July 27, 2021), eCRB Docket No. 25540 (*Phonorecords III)*, at 17.

[12] Copyright Owners' Motion to Compel Production of Documents and Information, *In the Matter of Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III*), eCRB Docket No. 23896 (May 6, 2021), at 11

[13] *See* Remand Written Rebuttal Testimony of Jeffrey A. Eisenach, Ph.D., *Phonorecords III*, eCRB Docket No. 25425, July 2, 2021 ("Eisenach RWRT"), at C-3.

[redacted].

For example, [redacted][15] [redacted][16] [redacted][17]

The Mechanical Licensing Collective also recognized this concern and requested that the Copyright Office clarify in regulations "that offerings with different consumer price points are different offerings to be reported separately."[18] The Copyright Office concluded that this issue was under the Judges' authority and declined to step in with an interpretation.[19] The proposed

---

[14] *See* COEX-7.20 ([redacted]).

[15] *See* COEX-7.68 [redacted]

[16] *See* COEX-7.69 [redacted].

[17] *See* COEX-7.70 [redacted].

[18] Letter from MLC to United States Copyright Office, Summary of ex parte call regarding Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective, dated Feb. 26, 2020 at 4.

[19] *See* Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, 85 Fed. Reg. 22518, at 22529 (Apr. 22, 2020) ("The MLC asks the Office to clarify 'that offerings with different consumer price points are different offerings to be reported separately.' The DLC disagrees. This issue does not seem appropriate for the Office to opine on one way or the other. The CRJs in part

Offering definition would provide that clarification, ensuring that separate Offering reporting under the compulsory license is on par with reporting everywhere else.

4. *Revenue & Service Provider Revenue*

Copyright Owners propose the following revised definitions of Revenue and Service Provider Revenue:

> *Revenue* means all monies and other sums including but not limited to all monies actually received by, or receivable by, and all payments made to, or credited to the Service Provider (or by any associate, employee, affiliate, representative, agent of the Service Provider or any other person acting on the Service Provider's behalf) as well as any ownership equity, monetary advances or guarantees, non-cash consideration, in-kind consideration, barter or any other monetary and/or nonmonetary consideration, however characterized, which shall be accounted for on the basis of fair market value of the product or service concerned, at the time the Service Provider constructively receives such consideration, advance, or guarantee.
>
> *Service Provider Revenue* means all Revenue in connection with any Licensed Activity, including:
>
> (1) all Revenue in connection with a Subscriber's access to an Offering, whether or not such access actually occurs, provided that:
>
>> (i) In instances of a Bundled Subscription Offering, Service Provider Revenue shall be the lesser of (i) the Revenue from the bundle and (ii) the aggregate standalone published prices for Subscribers for the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for Subscribers for the most closely comparable product or service that is offered to consumers in the U.S. or, if more than one such comparable exists, the average of standalone prices for such comparables.
>>
>> (ii) For any monies that are paid by or on behalf of a Subscriber pursuant to a billing cycle other than monthly (e.g., quarterly, semiannual or annual payment plans), the gross monies paid or payable by or on behalf of such Subscriber will be amortized and recognized as gross monies for the purpose of this definition evenly in equal monthly installments over the applicable billing period for the Subscriber concerned.

---

385 use the terms 'Licensed Activity' and 'Offering,' and provide definitions for both, which are relevant to the rate calculations. Any concerns should be addressed to the CRJs.").

> (2) all Revenue arising from the sale or placement of any and all advertisements, promotions, messages, sponsorships, commissions, or any other provision of space or time, that are leased, licensed or sold to or on behalf of third parties for purposes of advertising, promotion, marketing, sponsorship, commission, trade or otherwise (e.g. the development, maintenance or enhancement of good will) (together "Advertising") in connection with Licensed Activity, including, without limitation, all Revenue from the use or exploitation of End User data gathered from or generated by or in connection with Licensed Activity, less actual out-of-pocket ordinary and necessary business expenses paid to unaffiliated third parties in connection with Advertising, up to a maximum of fifteen per cent (15%).
>
> (3) any other Revenue in connection with any Licensed Activity.

The proposed definition of Service Provider Revenue provides clarity regarding the meaning and application of the term. To avoid repetition in the definition of Service Provider Revenue, Copyright Owners have provided a definition of Revenue to capture the scope of what should be considered receipt of consideration. This definition includes a provision that non-cash consideration shall be accounted for on the basis of fair market value at the time the Service Provider constructively receives such consideration. According to the Internal Revenue Service, "income is constructively received when an amount is credited to your account or made available to you without restriction. You do not need to have possession of it. If you authorize someone to be your agent and receive income for you, you are considered to have received it when your agent receives it."[20] This protects against accounting practices that delay the timing of receipt of income and thereby reduce current royalties.

Copyright Owners have also proposed reorganizing the definition of Service Provider Revenue to separately address Subscription and Advertising revenue. The current definition of Service Provider Revenue accounts for both Subscription and Advertising revenues but does not

[20] U.S. Department of the Treasury, Internal Revenue Service, Publication 538: Accounting Periods and Methods, (Jan. 2019), at 8, available at https://www.irs.gov/pub/irs-pdf/p538.pdf.

specifically or separately define each category. Instead, the current definition is broken out into multiple overlapping subparts, making it confusing and difficult to follow. The use of the phrase "recognized by" in the current definition has also created unnecessary ambiguity about the rules of reporting of revenue.

Copyright Owners have therefore reorganized the definition of Service Provider Revenue to address Subscription revenue in clause (1); Advertising revenue in clause (2); and any other revenue in clause (3). This distinct category approach is similar to many definitions of Service Provider Revenue in benchmark [redacted].[21]

Subsection (1) incorporates the idea that payments for Subscription Offerings which are not made monthly (i.e. quarterly or yearly) should be amortized evenly in equal monthly installment throughout the applicable Subscription period, ensuring that revenue is being accounted for in the appropriate period to match usage.[22] It also carries over the provision from the *Phonorecords III* Final Determination concerning calculating revenue in the case of Bundled Subscription Offerings.

Subsection (2) addresses revenue from Advertising through a simple and inclusive single provision. This articulation finds support in multiple interactive streaming sound recording agreements, which, for example define advertising revenue as [redacted]

---

[21] *See, e.g.*, COEX-7.21 [redacted].

[22] *Id.*

[redacted]"[23] or "[redacted][24] The inclusion of [redacted] is also reflected in market deals.[25]

Copyright Owners stress that these proposed changes attempt to close holes in the definition of Service Provider Revenue, but no definition of revenue can turn revenues into a truly reliable measure for royalties. Deferment and displacement of revenue, and tremendous revenue measurement problems, are a reality that this definition cannot change, and underscore the importance of the alternative rate prongs in the Proposed Rates.

5. Promotional Use

Copyright Owners propose the following revised definitions of Promotional Offering (retitled "Promotional Use"):

> Promotional Use means an Eligible Interactive Stream, not to exceed 90 seconds, the sole purpose of which is to promote the sale of that sound recording to an End User, and:

[23] *Id.* at [redacted].

[24] COEX-7.71 [redacted].

[25] *See, e.g.*, COEX-7.72 [redacted].

> (1) The Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);
>
> (2) The Eligible Interactive Stream is made available to the End User free of any charge;
>
> (3) The Service Provider does not receive any Revenue from the Eligible Interactive Stream; and
>
> (4) The Service Provider provides to the End User at the same time as the Eligible Interactive Stream an opportunity to purchase the sound recording.

This definition limits what constitutes Promotional Use. The Services offer promotions in order to further their competition for the market and the overall profits of their enterprise, and copyright owners should not be forced to subsidize these activities. Moreover, the authorization of promotions by record companies is not sufficient protection for musical work copyright owners, as the use may often promote concerts or merchandise in which record companies and artists have a financial interest but in which songwriters and music publishers do not.

Promotional previews directly in connection with the sale of sound recordings are allowed for, since those uses are targeted to promote sales from which copyright owners receive royalties, and by nature of the limitation to preview length, can be expected to not materially substitute for royalty-bearing usage.

6. <u>Subscriber</u>

The Rate Proposal adds a definition for the term Subscriber to provide clarity:

> *Subscriber* means an End User with an account or sub-account providing access to a Subscription Offering except, in the case of a Bundled Subscription Offering, a Subscriber means such an End User who has also made at least one Play during that month. For avoidance of doubt, each sub-account of a multiple user plan counts as a distinct Subscriber (*i.e.* if a Family Plan allows for six End Users, it will consist of one primary account Subscriber and five additional sub-account Subscribers).

Other terms and definitions in the regulations reference Subscribers, and an explicit definition for the term will aid in clarity. The proposed definition makes clear what has always been the proper understanding of the term, namely that Subscribers include all End Users who have access to a Subscription Offering. As Spotify explains in its SEC filings:

> We define Premium Subscribers as users that have completed registration with Spotify and have activated a payment method for Premium Service. Our Premium Subscribers include all registered accounts in our Family Plan. Our Family Plan consists of one primary subscriber and up to five additional sub-accounts, allowing up to six Premium Subscribers per Family Plan Subscription. Premium Subscribers includes subscribers in a grace period of up to 30 days after failing to pay their subscription fee.[26]

In launching its Family Plans, Pandora confirmed that the industry consensus matches the plain language understanding of a Subscriber as a user with access to subscription offerings:

> We do expect Family Plans to be an important growth contributor and we will be reporting Family Plan subscribers in a similar fashion as our competitors, counting each listener account in a Family Plan as a distinct subscriber.[27]

The proposed Subscriber definition clarifies this understanding, confirming that it is not reasonable to consider only master accounts on multiple account plans as Subscribers, when each account has access to the Subscription Offering.

Copyright Owners also submit that it is not reasonable to reduce Subscriber counts in the context of family and student plans, particularly in light of the dramatic shift in the market since *Phonorecords III*, which has left the market dominated entirely by diversified companies, which are not offering discounts to maximize streaming revenues, but rather to maximize the value of their enterprise as a whole. As noted below, the Rate Proposal has deleted the definitions for Family Plan and Student Plan, and do not provide for Subscriber reductions for such plans.

---

[26] COEX-7.79 (Spotify Form 6-K for July 2021) at 28.

[27] COEX-8.61 (Pandora 2018 Q2 Earnings Call) at 7.

7. *Additional Definition Changes*

(a) *Eligible Limited Download*

Copyright Owners propose the following revised definition of Eligible Limited Download:

> *Eligible Limited Download* means the transmission of a specifically identifiable, protected and tethered (but obfuscated) Digital Phonorecord Delivery to a Subscriber that is only accessible for listening for an amount of time not to exceed thirty-one (31) days from the time of the Subscriber's latest transmission. Such time period may be extended up to another 31 days each time a Subscriber makes a specific request through a live network connection.

The revised definition provides that Subscribers will be able to access Plays offline. Nonsubscription plans generally do not provide for offline listening, which can be an upgrade feature to encourage subscription. The definition also changes from "one month" to "thirty-one (31) days" to ensure consistency given the variation in the number of days in each month. This time period is also supported by [redacted].[28]

(b) *Restricted Download*

Copyright Owners propose the following definition of Restricted Download:

> *Restricted Download* means a Digital Phonorecord Delivery that remains accessible for future listening, but may not be retained and played on a permanent basis. The term Restricted Download excludes Eligible Limited Downloads and Eligible Interactive Streams.

This revision would close a hole in the terms that could be seen as leaving some uses without a rate. Restricted Downloads are currently defined as any download that is not permanent, including Eligible Limited Downloads. However, existing regulations do not provide a rate for Restricted Downloads. The definition is used in connection with Purchased Content Locker

---

[28] *See* COEX-7.26 [redacted] COEX-7.25 [redacted].

Services to authorize Restricted Downloads in that context, but there is no regulation to address Restricted Downloads that are not Eligible Limited Downloads outside of locker services. The proposed revised definition excludes Eligible Limited Downloads, while elsewhere the proposed terms maintain the allowance for zero rate Restricted Downloads solely in connection with Purchased Content Locker Services and set a rate for other Restricted Downloads equal to the penny rate for Permanent Downloads, 9.1 cents or 1.75 cents per minutes of playing time, as set forth in Subpart D. Since Restricted Downloads in the revised definition do not include Eligible Limited Downloads, and have virtually no limitations on retainer and use, Copyright Owners submit that the penny rate for Permanent Downloads is the most apt rate to cover this loophole. Copyright Owners are not aware of any current uses of Restricted Downloads (outside the context of Purchased Content Locker Services) in the market.

(c) Play

Copyright Owners propose the following revised definition of Play:

> *Play* means an Eligible Interactive Stream, or Play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, playing or streaming the Licensed Activity for the entire duration of the track. A Play excludes an Eligible Interactive Stream or Play of an Eligible Limited Download that the Service Provider has reasonably determined was not initiated or requested by a human user.

The proposed definition of Play largely maintains the extant definition, but instead of the automatic exclusion of consecutive Plays in excess of fifty under *Phonorecords III*, the definition excludes Plays that the Service Provider has reasonably determined were not initiated or requested by a human user. Using fifty-one consecutive Plays as a bright line for excluding fraudulent Plays is arbitrary and ineffective, as any sophisticated bot would simply be programmed to not exceed fifty consecutive Plays of a single track.

(d) Subscription Offering

Copyright Owners propose the following revised definition of Subscription (retitled "Subscription Offering"):

> *Subscription Offering* means an Offering for which payment is required for an End User to have access to the Offering for defined periods of time, whether payment is for access to the Offering on a standalone basis or as part of a bundle.

Copyright Owners' proposed definition keeps the current definition largely intact but removes the limitation that the subscription period must be three years or less. Such a limitation would leave subscriptions for more than three years without any rate, which would be unreasonable, and there is no reason to treat 3-year subscriptions and 4-year subscriptions differently.

(e) TCC (or Total Cost of Sound Recording Content)

Copyright Owners propose the following revised definition of *TCC.*

> *TCC (or Total Cost of Sound Recording Content)* means all applicable consideration conveyed, paid, or otherwise provided by the Service Provider for rights to make Eligible Interactive Streams or Eligible Limited Downloads of sound recordings embodying musical works for the Accounting Period. As used in this definition, "applicable consideration" means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances or guarantees, non-cash consideration, in-kind consideration, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an affiliate, associate, employee, representative, or agent of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Applicable consideration shall be accounted for on the basis of fair market value of the consideration at the time such consideration is conveyed by the Service Provider.

Copyright Owners' proposed revisions largely keep the current definition of TCC intact, but with some additional revisions and clarifying language. For example, TCC should not be the "total amount expensed by a Service Provider or any of its affiliates in accordance with GAAP" as it provides the Service Providers with too much power to determine what it constitutes as an expense. Instead, Copyright Owners have replaced it with "conveyed, paid, or otherwise provided." This revision protects against accounting practices which would allow Service Providers to defer or even exclude proper costs, thereby reducing TCC and impacting the royalty pool calculation.

Copyright Owners have also expanded what is included in the defined term of "applicable consideration" to make sure Service Providers are accounting for non-cash or in-kind consideration on the basis of fair market value at the time such consideration is conveyed. This revision protects against practices that delay the timing of receipt of such consideration, which can unfairly alter the TCC for any accounting period.

8. <u>Conforming Definition Changes</u>

(a) End User

Copyright Owners propose revisions to the definition of End User to ensure this definition incorporates the newly-defined term "Subscriber" for consistency purposes and clarifies that each End User is an individual person.

(b) Licensed Activity

Copyright Owners propose revisions to the definition of Licensed Activity to clarify that Licensed Activity covers Eligible Interactive Streams and Eligible Limited Downloads and remove extraneous language.

(c) Purchased Content Locker Service

Copyright Owners propose revisions to the definition of Purchased Content Locker Service to conform the definition with the removal of Paid Locker Service (which described an offering that is no longer on the market and no longer has a separate rate and so no longer requires a separate definition). The proposal merges language from the definition of Locker Service into Purchased Content Locker Service, and reorganizes the language for clarity.

(d) Service Provider

The proposal largely keeps this definition the same, but has removed the language "otherwise controls" from Subpart (1), which could be misinterpreted to exclude a Service Provider that operates a user-generated content site. Copyright Owners new formulation of "markets or sells Licensed Activity to End Users" will cover the same service providers, without providing a potential loophole. These changes ensure that an entity licensed to be a Service Provider is able to pay royalties to Copyright Owners. The phrase "markets or sells Licensed Activity to End Users" furthers that purpose.

9. <u>Deleted Definitions</u>

The Rate Proposal omits definitions for Family Plan, Student Plan, Free Trial Offering, Locker Service, Paid Locker Service, Mixed Service Bundle and Relevant Page, because those terms are not used in the Proposed Rates. The definitions of Family Plan, Student Plan and Free Trial Offerings have been deleted because the associated discount rates have been removed. Copyright Owners should not bear any of the cost of Service discounts, which are offered in furtherance of platform growth and ecosystem profit, in which copyright owners generally do not share.

Separate terms for Paid Locker Services have been removed because Service Providers are no longer offering this service, and without terms for Paid Locker Service, there is no need for a definition for Locker Service, which was used for terms common to Paid Locker Service and Purchased Content Locker Service. Copyright Owners have retained the definition of Purchased Content Locker Service, which is still offered by certain Service Providers. The relevant parts of the definition of Locker Service have been incorporated into the definition of Purchased Content Locker Service.

Mixed Service Bundle is omitted because it is duplicative and unnecessary in light of the revised definition of Bundled Subscription Offering.

Relevant Page is omitted as no longer necessary given the revised definition of Advertising revenue, which more clearly and adequately defines revenue to be declared in connection with advertising.

Dated: October 13, 2021

Respectfully submitted,

PRYOR CASHMAN LLP

By: _/s/ Benjamin K. Semel__________
Benjamin K. Semel (N.Y. Bar No. 2963445)
Frank P. Scibilia (N.Y. Bar No. 2762466)
Donald S. Zakarin (N.Y. Bar No. 1545383)

7 Times Square
New York, New York 10036-6569
Telephone: (212) 421-4100
Facsimile: (212) 326-0131
Email: bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com

Counsel for Copyright Owners

Appendix A

PROPOSED REGULATIONS [CLEAN][1]

Subpart A – Regulations of General Application

37 C.F.R.

§ 385.1 General.

Effective: January 1, 2023

(a) *Scope*. This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) *Legal compliance*. Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) *Interpretation*. This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) *Relationship to voluntary agreements*. The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part.

§ 385.2 Definitions.

Effective: January 1, 2023

For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

---

[1] Upon adoption of these proposed rates and terms, corresponding payment and accounting regulations will be implemented to conform the provisions currently embodied at 37 C.F.R. Part 210.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundled Subscription Offering means a Subscription Offering that is made available to End Users (i) as a combination of two or more marketable products or services where the applicable products or services are offered for a single price that cannot be disaggregated; or (ii) a discounted Subscription Offering that is available only to consumers who have purchased one or more other products or services.

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means the transmission of a specifically identifiable, protected and tethered (but obfuscated) Digital Phonorecord Delivery to a Subscriber that is only accessible for listening for an amount of time not to exceed thirty-one (31) days from the time of the Subscriber's latest transmission. Such time period may be extended up to another 31 days each time a Subscriber makes a specific request through a live network connection.

End User means each individual person that:

(1) is a Subscriber during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity means the activity of making a Digital Phonorecord Delivery of musical works, under voluntary or statutory license, in the form of Eligible Interactive Streams and Eligible Limited Downloads.

Limited Offering means a Subscription Offering providing Licensed Activity which meets one of the following criteria –

(1) The Subscriber's ability to choose to listen to particular sound recordings on demand is substantially limited (*e.g.*, the Offering does not allow streams of individual recordings on demand, or streams are rendered only as part of specific, limited programs or playlists);

(2) The catalog of sound recordings available to Subscribers is limited to a particular genre (or subset of related genres);

(3) The Subscription Offering does not make available sound recordings licensed and provided by third-party record companies; or

(4) The Subscription Offering does not, on any day in a calendar month, make more than three million (3,000,000) different sound recordings of musical works available through such Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Offering means a product or service offered by a Service Provider providing Licensed Activity. Each such product or service is a distinct Offering if it is: (a) marketed or sold at a different price or with different branding; (b) subject to different End User eligibility requirements; or (c) subject to different terms and conditions of use. Each Bundled Subscription Offering with distinct components is a distinct Offering.

Performance Royalty means the license fee payable for the right to perform publicly musical works in Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-Play information is unavailable because of bona fide technical limitations, the per-Play royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

Permanent Download has the same meaning as in 17 U.S.C. 115(e).

Play means an Eligible Interactive Stream, or Play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, playing or streaming the Licensed Activity for the entire duration of the track. A Play excludes an Eligible Interactive Stream or Play of an Eligible Limited Download that the Service Provider has reasonably determined was not initiated or requested by a human user.

Promotional Use means an Eligible Interactive Stream, not to exceed 90 seconds, the sole purpose of which is to promote the sale of that sound recording to an End User, and:

> (1) The Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);
>
> (2) The Eligible Interactive Stream is made available to the End User free of any charge;
>
> (3) The Service Provider does not receive any Revenue from the Eligible Interactive Stream; and
>
> (4) The Service Provider provides to the End User at the same time as the Eligible Interactive Stream an opportunity to purchase the sound recording.

Purchased Content Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones or physical phonorecords, for which the Service has reasonably determined that the End User has purchased from a qualifying seller phonorecords of the applicable sound recordings prior to the End User's first request to have access to the sound recordings by means of the Service. The term Purchased Content Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

> (1) A qualifying seller for purposes of this definition is the entity operating the Service Provider, including affiliates, predecessors, or successors in interest, or—
>
>> (i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or
>>
>> (ii) In the case of physical phonorecords:
>>
>>> (A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the

same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

(2) Use of a Purchased Content Locker Service enables the End User to—

(i) Receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase; or

(ii) Subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, or Restricted Downloads or Ringtones.

Restricted Download means a Digital Phonorecord Delivery that remains accessible for future listening, but may not be retained and played on a permanent basis. The term Restricted Download excludes Eligible Limited Downloads and Eligible Interactive Streams.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Revenue means all monies and other sums including but not limited to all monies actually received by, or receivable by, and all payments made to, or credited to the Service Provider (or by any associate, employee, affiliate, representative, agent of the Service Provider or any other person acting on the Service Provider's behalf) as well as any ownership equity, monetary advances or guarantees, non-cash consideration, in-kind consideration, barter or any other monetary and/or nonmonetary consideration, however characterized, which shall be accounted for on the basis of fair market value of the product or service concerned, at the time the Service Provider constructively receives such consideration, advance, or guarantee.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with End Users or markets or sells Licensed Activities to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue means all Revenue in connection with any Licensed Activity, including:

(1) all Revenue in connection with a Subscriber's access to an Offering, whether or not such access actually occurs, provided that:

(i) In instances of a Bundled Subscription Offering, Service Provider Revenue shall be the lesser of (i) the Revenue from the bundle and (ii) the aggregate standalone published prices for Subscribers for the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for Subscribers for the most closely comparable product or service that is offered to consumers in the U.S. or, if more than one such comparable exists, the average of standalone prices for such comparables.

(ii) For any monies that are paid by or on behalf of a Subscriber pursuant to a billing cycle other than monthly (e.g., quarterly, semiannual or annual payment plans), the gross monies paid or payable by or on behalf of such Subscriber will be amortized and recognized as gross monies for the purpose of this definition evenly in equal monthly installments over the applicable billing period for the Subscriber concerned.

(2) all Revenue arising from the sale or placement of any and all advertisements, promotions, messages, sponsorships, commissions, or any other provision of space or time, that are leased, licensed or sold to or on behalf of third parties for purposes of advertising, promotion, marketing, sponsorship, commission, trade or otherwise (e.g. the development, maintenance or enhancement of good will) (together "Advertising") in connection with Licensed Activity, including, without limitation, all Revenue from the use or exploitation of End User data gathered from or generated by or in connection with Licensed Activity, less actual out-of-pocket ordinary and necessary business expenses paid to unaffiliated third parties in connection with Advertising, up to a maximum of fifteen per cent (15%).

(3) any other Revenue in connection with any Licensed Activity.

Sound Recording Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of a person identified in paragraph (1) through (3).

Stream means the digital transmission of a sound recording of a copyrighted musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Subscriber means an End User with an account or sub-account providing access to a Subscription Offering except, in the case of a Bundled Subscription Offering, a Subscriber means such an End User who has also made at least one Play during that month. For avoidance of doubt, each sub-account of a multiple user plan counts as a distinct Subscriber (*i.e.* if a Family Plan allows for six End Users, it will consist of one primary account Subscriber and five additional sub-account Subscribers).

Subscription Offering means an Offering for which payment is required for an End User to have access to the Offering for defined periods of time, whether payment is for access to the Offering on a standalone basis or as part of a bundle.

TCC (or Total Cost of Sound Recording Content) means all applicable consideration conveyed, paid, or otherwise provided by the Service Provider for rights to make Eligible Interactive Streams or Eligible Limited Downloads of sound recordings embodying musical works for the Accounting Period. As used in this definition, "applicable consideration" means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances or guarantees, non-cash consideration, in-kind consideration, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an affiliate, associate, employee, representative, or agent of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Applicable consideration shall be accounted for on the basis of fair market value of the consideration at the time such consideration is conveyed by the Service Provider.

§ 385.3 Late payments.

Effective: January 1, 2023

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to the mechanical licensing collective and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the mechanical licensing collective receives payment in accordance with 17 U.S.C. 115(d)(8)(B)(i).

§ 385.4 Recordkeeping for promotional non-royalty-bearing uses.

Effective: January 1, 2023

(a) *General*. A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional Use zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the Promotional Use authorized, and the beginning and end date of each zero rate Offering.

(b) *Retention of records*. A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of records*. If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

Subpart B – Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

37 C.F.R.

§ 385.10 Scope.

Effective: January 1, 2023

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of physical phonorecord deliveries, Permanent Downloads, Ringtones, and Music Bundles in accordance with the provisions of 17 U.S.C. 115.

§ 385.11 Royalty rates.

Effective: January 1, 2023

(a) *Physical phonorecord deliveries and Permanent Downloads*. For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones*. For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles*. For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C – Eligible Interactive Streams and Eligible Limited Downloads

37 C.F.R.

§ 385.20 Scope.

Effective: January 1, 2023

This subpart establishes rates and terms of royalty payments for Licensed Activity.

§385.21 Royalty rates and calculations.

Effective: January 1, 2023

(a) *Applicable royalty*. Licensees that engage in Licensed Activity covered by this subpart pursuant to 17 U.S.C. 115 shall pay royalties that are calculated as provided in this section.

(b) *Rate calculation*. Royalty payments for Licensed Activity in this subpart shall be calculated as set forth below. If a Service Provider provides multiple Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue, TCC, Performance Royalties, Subscribers and Plays associated with each Offering.

(1) Step 1: For each Accounting Period, calculate the greater of 20 percent of Service Provider Revenue and 40 percent of TCC.

(2) Step 2: Subtract applicable Performance Royalties from the amount determined in step 1 in paragraph (b)(1) of this section.

(3) Step 3: Determine the payable royalty pool, which is the amount payable under the rates and terms of this subpart for Licensed Activity for the Offering during the Accounting Period. This amount is the greater of:

(i) The result determined in step 2 in paragraph (b)(2) of this section; and

(ii) The alternative royalty calculation, which is the greater of the (1) Play calculation and (2) Subscriber calculation.

(1) For the year 2023, the Play rate shall be $0.0015 per Play for all Offerings. The Play calculation is the Play rate multiplied by the number of Plays.

(2) For the year 2023, the Subscriber rate shall be $1.50 per Subscriber for all Subscription Offerings other than Limited Offerings and Bundle Subscription Offerings. The Subscriber calculation is the Subscriber rate multiplied by the number of Subscribers. In calculating the number of Subscribers, count all End Users who were Subscribers for complete calendar months and prorate those who were Subscribers for only part of a calendar month.

a. For Limited Offerings and non-Subscription Offerings the Subscriber rate shall be zero.

b. For Bundled Subscription Offerings, the Subscriber rate is the rate that would apply to the music component of the bundle if it were offered on a standalone basis

(3) Annual rate adjustment. The Copyright Royalty Judges shall adjust the Subscriber rate and Play rate each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year. The calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI-U from the CPI-U published in November, 2022 (the Base Rate) and shall be made according to the following formulas: for the Subscriber rate, (1 + (Cy − Base Rate) / Base Rate) × \$1.50; for the Play rate, (1 + (Cy − Base Rate) / Base Rate) × \$0.0015; where Cy is the CPI-U published by the Secretary of Labor before December 1 of the preceding year. The adjusted rate shall be rounded to the nearest fourth decimal place. The Judges shall publish notice of the adjusted fees in the Federal Register at least 25 days before January 1. The adjusted fees shall be effective on January 1.

(4) Step 4: Calculate the per-work royalty allocation, which is the amount payable for the reproduction and distribution of each copyrighted musical work used in Licensed Activity through the Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section shall be divided by the total number of Plays through the Offering during the Accounting Period to yield a per-Play allocation. Plays of sound recordings of musical works with a playing time of over 5 minutes shall be counted as provided in paragraph (c) of this section. The per-Play allocation is then multiplied by the number of Plays of each musical work through the Offering during the Accounting Period to determine each per-work royalty allocation. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment*. For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

(1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays.

(2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays.

(3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays.

(4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays.

(5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays.

(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

(d) *Accounting*. The information underlying the calculations required by paragraph (b) of this section shall be provided to the Mechanical Licensing Collective in good faith and on the basis of the best knowledge, information, and belief at the time reporting is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(2)(I), 17 U.S.C. 115(d)(4)(A)(i), and part 210 of this title. Without limitation, statements of account shall set forth each step of the calculations with sufficient information to allow the assessment of the accuracy and manner in which the payable royalty pool and per-Play allocations were determined, and indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

Subpart D – Restricted Downloads, Purchased Content Locker Services, and Promotional Use

37 C.F.R.

§ 385.30 Scope.

Effective: January 1, 2023

This subpart establishes rates and terms of royalty payments for Restricted Downloads, Purchased Content Locker Services and Promotional Use provided by Subscription and non-Subscription Offerings.

§ 385.31 Royalty rates.

Effective: January 1, 2023

(a) *Purchased Content Locker Services*. For Licensed Activity in connection with a Purchased Content Locker Service for which the Service Provider receives no additional Revenues and for which the TCC is zero, the royalty rate is zero.

(b) *Restricted Downloads*. For Restricted Downloads the Licensee makes available other than those made available in connection with Purchased Content Locker Services, the royalty rate payable for each work embodied in the Restricted Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(c) *Promotional Use*. For Eligible Interactive Streams in connection with Promotional Use, the royalty rate is zero.

(d) *Unauthorized use*. If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

Appendix B

PROPOSED REGULATIONS [REDLINED]

Subpart A – Regulations of General Application
37 C.F.R.

§ 385.1 General.

Effective: ~~February 5~~January 1, ~~2019~~2023

(a) *Scope*. This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) *Legal compliance*. Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) *Interpretation*. This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) *Relationship to voluntary agreements*. The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part.

§ 385.2 Definitions.

Effective: ~~July 8~~January 1, ~~2019~~2023

For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundled Subscription Offering means a Subscription Offering ~~providing Licensed Activity consisting of Streams or Eligible Limited Downloads~~ that is made available to End Users ~~with~~(i) as a combination of two or more marketable products or services where the applicable products or services are offered for a single price that cannot be disaggregated; or (ii) a discounted Subscription Offering that is available only to consumers who have purchased one or more other products or services ~~(including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price).~~.

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means ~~a~~the transmission of a ~~sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a~~specifically identifiable, protected and tethered (but obfuscated) Digital Phonorecord Delivery ~~of that sound recording~~to a Subscriber that is only accessible for listening for~~—~~ an amount of time not to exceed thirty-one (31) days from the time of the Subscriber's latest transmission. Such time period may be extended up to another 31 days each time a Subscriber makes a specific request through a live network connection.

~~(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or~~

~~(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.~~

End User means each ~~unique~~individual person that:

(1) ~~Pays a subscription fee for an Offering~~is a Subscriber during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

~~*Family Plan* means a discounted subscription to be shared by two or more family members for a single subscription price.~~

~~*Free Trial Offering* means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when:~~

~~(1) Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering;~~

~~(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;~~

~~(3) In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;~~

~~(4) Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;~~

~~(5) The Free Trial Offering is made available to the End User free of any charge; and~~

~~(6) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the Service Provider.~~

~~*GAAP* means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as "GAAP" for purposes of this subpart.~~

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity~~, as the term is used in subpart B of this part, means~~ means the activity of making a Digital Phonorecord Delivery of musical works, under voluntary or statutory license, ~~via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with~~in the form of Eligible Interactive Streams~~,~~ and Eligible Limited Downloads~~, Limited Offerings, mixed Bundles, and Locker Services~~.

Limited Offering means a Subscription ~~plan providing Eligible Interactive Streams or Eligible Limited Downloads for which —~~Offering providing Licensed Activity which meets one of the following criteria –

(1) ~~An End User cannot~~The Subscriber's ability to choose to listen to ~~a~~ particular sound ~~recording~~recordings on demand is substantially limited (~~i.~~*e.g.*, the ~~Service Provider~~Offering does not ~~provide Eligible Interactive~~allow streams of individual recordings ~~that are on-demand, and Eligible Limited Downloads~~on demand, or streams are rendered only as part of specific, limited programs ~~rather than as individual recordings that are on-demand~~or playlists); ~~or~~

(2) The ~~particular~~catalog of sound recordings available to ~~the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (e.g., a product~~Subscribers is limited to a particular genre (or ~~permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).~~subset of related genres);

(3) The Subscription Offering does not make available sound recordings licensed and provided by third-party record companies; or

(4) The Subscription Offering does not, on any day in a calendar month, make more than three million (3,000,000) different sound recordings of musical works available through such Offering.

~~*Locker Service* means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.~~

~~*Mixed Service Bundle* means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (e.g., internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.~~

Music Bundle means two or more of physical phonorecords, Permanent Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord

Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Offering means a ~~Service Provider's engagement in Licensed Activity covered by subparts C and D of this part. Paid Locker Service means a Locker Service for which the End User pays a fee to the~~product or service offered by a Service Provider~~.~~ providing Licensed Activity. Each such product or service is a distinct Offering if it is: (a) marketed or sold at a different price or with different branding; (b) subject to different End User eligibility requirements; or (c) subject to different terms and conditions of use. Each Bundled Subscription Offering with distinct components is a distinct Offering.

Performance Royalty means the license fee payable for the right to perform publicly musical works in ~~any of the forms covered by subparts C and D this part.~~Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-Play information is unavailable because of bona fide technical limitations, the per-Play royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

Permanent Download has the same meaning as in 17 U.S.C. 115(e).

Play means an Eligible Interactive Stream, or Play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, ~~an Eligible Interactive Stream or play of an Eligible Limited Download of the~~playing or streaming the Licensed Activity for the entire duration of the track. A Play excludes an Eligible Interactive Stream or Play of an Eligible Limited Download that ~~has not been~~the Service Provider has reasonably determined was not initiated or requested by a human user. ~~If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.~~

~~*Promotional Offering* means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to~~

~~promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:~~

~~(1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;~~

~~(2) For Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;~~

Promotional Use means an Eligible Interactive Stream, not to exceed 90 seconds, the sole purpose of which is to promote the sale of that sound recording to an End User, and:

> (~~3~~1) ~~For Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds,~~ The Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);
>
> (~~4~~2) The ~~Promotional Offering~~Eligible Interactive Stream is made available to ~~an~~the End User free of any charge;~~ and~~
>
> (3) The Service Provider does not receive any Revenue from the Eligible Interactive Stream; and
>
> (~~5~~4) The Service Provider provides to the End User at the same time as the ~~Promotional Offering~~Eligible Interactive Stream an opportunity to purchase the sound recording~~ or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider~~.

Purchased Content Locker Service means ~~a Locker Service made available to End User purchasers of~~ an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones~~, or physical phonorecords~~ at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones~~,~~ or physical phonorecords~~ acquired~~, for which the Service has reasonably determined that the End User has purchased from a qualifying seller~~. With a~~ phonorecords of the applicable sound recordings prior to the End User's first request to have access to the sound recordings by means of the Service. The term Purchased Content Locker Service~~, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of~~

~~musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.~~ does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

(1) A qualifying seller for purposes of this definition is the entity operating the Service Provider, including affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

~~(2) [Reserved]~~

(2) Use of a Purchased Content Locker Service enables the End User to—

(i) Receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase; or

(ii) Subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, or Restricted Downloads or Ringtones.

~~*Relevant Page* means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (e.g., an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users~~

~~can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).~~

Restricted Download means a Digital Phonorecord Delivery ~~in a form that cannot~~that remains accessible for future listening, but may not be retained and ~~replayed~~played on a permanent basis. The term Restricted Download ~~includes an~~excludes Eligible Limited ~~Download~~Downloads and Eligible Interactive Streams.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Revenue means all monies and other sums including but not limited to all monies actually received by, or receivable by, and all payments made to, or credited to the Service Provider (or by any associate, employee, affiliate, representative, agent of the Service Provider or any other person acting on the Service Provider's behalf) as well as any ownership equity, monetary advances or guarantees, non-cash consideration, in-kind consideration, barter or any other monetary and/or nonmonetary consideration, however characterized, which shall be accounted for on the basis of fair market value of the product or service concerned, at the time the Service Provider constructively receives such consideration, advance, or guarantee.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with End Users or ~~otherwise controls the content made available~~markets or sells Licensed Activities to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

~~*Service Provider Revenue*.~~

~~(1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, Service Provider Revenue shall mean:~~

~~(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;~~

~~(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party "in-stream" or "in-download" advertising as part of any~~

~~Offering, i.e., advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and~~

~~(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.~~

~~(2)~~ *Service Provider Revenue* ~~shall~~means all Revenue in connection with any Licensed Activity, including:

(1) all Revenue in connection with a Subscriber's access to an Offering, whether or not such access actually occurs, provided that:

~~(i) Include revenue recognized by the Service Provider, or by any associate, affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and~~

~~(ii) Include the value of any barter or other nonmonetary consideration; and~~

~~(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.~~

~~(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.~~

~~(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.~~

(~~5~~i) In instances ~~in which a~~ of a Bundled Subscription Offering, Service Provider ~~provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition~~Revenue shall be the lesser of (i) the Revenue ~~recognized~~ from ~~End Users for~~ the bundle and (ii) the aggregate standalone published prices for ~~End Users~~Subscribers for ~~each of~~ the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for ~~End Users~~Subscribers for the most closely comparable product or service that is offered to consumers in the U.S. or, if more than one such comparable exists, the average of standalone prices for such comparables.

(ii) For any monies that are paid by or on behalf of a Subscriber pursuant to a billing cycle other than monthly (e.g., quarterly, semiannual or annual payment plans), the gross monies paid or payable by or on behalf of such Subscriber will be amortized and recognized as gross monies for the purpose of this definition evenly in equal monthly installments over the applicable billing period for the Subscriber concerned.

(2) all Revenue arising from the sale or placement of any and all advertisements, promotions, messages, sponsorships, commissions, or any other provision of space or time, that are leased, licensed or sold to or on behalf of third parties for purposes of advertising, promotion, marketing, sponsorship, commission, trade or otherwise (e.g. the development, maintenance or enhancement of good will) (together "Advertising") in connection with Licensed Activity, including, without limitation, all Revenue from the use or exploitation of End User data gathered from or generated by or in connection with Licensed Activity, less actual out-of-pocket ordinary and necessary business expenses paid to unaffiliated third parties in connection with Advertising, up to a maximum of fifteen per cent (15%).

(3) any other Revenue in connection with any Licensed Activity.

Sound Recording Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of ~~the Copyright Owner of the sound recording~~a person identified in paragraph (1) through (3).

Stream means the digital transmission of a sound recording of a copyrighted musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission,

except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

~~*Student Plan* means a discounted Subscription to an Offering available on a limited basis to students.~~

Subscriber means an End User with an account or sub-account providing access to a Subscription Offering except, in the case of a Bundled Subscription Offering, a Subscriber means such an End User who has also made at least one Play during that month. For avoidance of doubt, each sub-account of a multiple user plan counts as a distinct Subscriber (*i.e.* if a Family Plan allows for six End Users, it will consist of one primary account Subscriber and five additional sub-account Subscribers).

Subscription *Offering* means an Offering for which payment is required for an End ~~Users are required to pay a fee~~User to have access to the Offering for defined ~~subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes~~periods of time, whether payment is for access to the Offering on a standalone basis or as part of a bundle~~ with one or more other products or services~~.

TCC (or Total Cost of ~~*Content or TCC* means the total amount expensed by a~~*Sound Recording Content)* means all applicable consideration conveyed, paid, or otherwise provided by the Service Provider ~~or any of its affiliates in accordance with GAAP~~ for rights to make Eligible Interactive Streams or Eligible Limited Downloads of ~~a~~sound recordings embodying musical ~~work embodied in a sound recording through the Service Provider~~works for the Accounting Period~~, which amount shall equal the applicable consideration for those rights at the time the applicable consideration is properly recognized as an expense under GAAP~~. As used in this definition, "applicable consideration" means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances or guarantees, non-cash consideration, in-kind consideration, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an affiliate, associate, employee, representative, or agent of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. ~~Notwithstanding the foregoing,~~ Applicable consideration shall ~~not include in-kind promotional consideration given to a Sound Recording Company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional~~be accounted for on the basis of fair market value of the consideration at the time such consideration is ~~given in connection with a use that qualifies for licensing under 17 U.S.C. 115~~conveyed by the Service Provider.

§ 385.3 Late payments.

Effective: ~~July 8~~January 1, ~~2019~~2023

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to ~~a Copyright Owner~~the mechanical licensing collective and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or 115(d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the ~~Copyright Owner~~mechanical licensing collective receives payment in accordance with 17 U.S.C. 115(d)(8)(B)(i).

§ 385.4 Recordkeeping for promotional ~~or free trial~~ non-royalty-bearing uses.

Effective: ~~July 8~~January 1, ~~2019~~2023

(a) *General*. A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional ~~or Free Trial~~Use zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the Promotional ~~activities~~Use authorized, ~~the identity of the Offering or Offerings for which the zero-rate is authorized (including the internet address if applicable),~~ and the beginning and end date of each zero rate Offering.

(b) *Retention of records*. A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of records*. If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

Subpart B – Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

37 C.F.R.

§ 385.10 Scope.

Effective: ~~February 5~~January 1, ~~2019~~2023

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of ~~Digital~~physical phonorecord deliveries, Permanent Downloads, Ringtones, and Music Bundles in accordance with the provisions of 17 U.S.C. 115.

§ 385.11 Royalty rates.

Effective: ~~July 8~~January 1, ~~2019~~2023

(a) *Physical phonorecord deliveries and Permanent Downloads*. For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones*. For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles*. For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C – Eligible Interactive ~~Streaming,~~Streams and Eligible Limited Downloads~~, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations~~

37 C.F.R.

§ 385.20 Scope.

Effective: ~~July 8~~January 1, ~~2019~~2023

This subpart establishes rates and terms of royalty payments for ~~Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.~~Licensed Activity.

§385.21 Royalty rates and calculations.

Effective: ~~July 8~~January 1, ~~2019~~2023

(a) *Applicable royalty*. Licensees that engage in Licensed Activity covered by this subpart pursuant to 17 U.S.C. 115 shall pay royalties ~~therefor~~ that are calculated as provided in this section~~, subject to the royalty floors for specific types of services described in § 385.22~~.

(b) *Rate calculation*. Royalty payments for Licensed Activity in this subpart shall be calculated as ~~provided in paragraph (b) of this section~~set forth below. If a Service Provider ~~includes different~~provides multiple Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue ~~and expenses~~, TCC, Performance Royalties, Subscribers and Plays associated with each Offering.

(1) Step 1: ~~Calculate the all- In royalty for the Offering.~~ For each Accounting Period, ~~the all-in royalty shall be~~calculate the greater of ~~the applicable~~20 percent of Service Provider Revenue and ~~the applicable~~40 percent of TCC ~~set forth in the following table~~.

~~Table 1 to~~ (2) Step 2: Subtract applicable Performance Royalties from the amount determined in step 1 in paragraph (b)(1) ~~— 2018-2022 All-In Royalty Rates~~ of this section.

~~Royalty year~~	~~2018 (%)~~	~~2019 (%)~~	~~2020 (%)~~	~~2021 (%)~~	~~2022 (%)~~
~~Percent of Revenue~~	~~11.4~~	~~12.3~~	~~13.3~~	~~14.2~~	~~15.1~~

~~Percent of TCC~~	~~22.0~~	~~23.1~~	~~24.1~~	~~25.2~~	~~26.2~~

~~(2) Step 2: Subtract applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-play information is unavailable because of bona fide technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4 in paragraph (b)(4) of this section.~~

(3) Step 3: Determine the payable royalty pool~~. The payable royalty pool~~, which is the amount payable ~~for the reproduction and distribution of all musical works used by the Service Provider by virtue of its~~under the rates and terms of this subpart for Licensed Activity for ~~a particular~~the Offering during the Accounting Period. This amount is the greater of:

(i) The result determined in step 2 in paragraph (b)(2) of this section; and

(ii) The ~~royalty floor (if any) resulting from the calculations described in § 385.22~~alternative royalty calculation, which is the greater of the (1) Play calculation and (2) Subscriber calculation.

(1) For the year 2023, the Play rate shall be $0.0015 per Play for all Offerings. The Play calculation is the Play rate multiplied by the number of Plays.

(2) For the year 2023, the Subscriber rate shall be $1.50 per Subscriber for all Subscription Offerings other than Limited Offerings and Bundle Subscription Offerings. The Subscriber calculation is the Subscriber rate multiplied by the number of Subscribers. In calculating the number of Subscribers, count all End Users who were Subscribers for complete

calendar months and prorate those who were Subscribers for only part of a calendar month.

a. For Limited Offerings and non-Subscription Offerings the Subscriber rate shall be zero.

b. For Bundled Subscription Offerings, the Subscriber rate is the rate that would apply to the music component of the bundle if it were offered on a standalone basis

(3) Annual rate adjustment. The Copyright Royalty Judges shall adjust the Subscriber rate and Play rate each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year. The calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI-U from the CPI-U published in November, 2022 (the Base Rate) and shall be made according to the following formulas: for the Subscriber rate, (1 + (Cy − Base Rate) / Base Rate) × \$1.50; for the Play rate, (1 + (Cy − Base Rate) / Base Rate) × \$0.0015; where Cy is the CPI-U published by the Secretary of Labor before December 1 of the preceding year. The adjusted rate shall be rounded to the nearest fourth decimal place. The Judges shall publish notice of the adjusted fees in the Federal Register at least 25 days before January 1. The adjusted fees shall be effective on January 1.

(4) Step 4: Calculate the per-work royalty allocation~~. This~~, which is the amount payable for the reproduction and distribution of each copyrighted musical work used ~~by the Service Provider by virtue of its~~in Licensed Activity through ~~a particular~~the Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section ~~must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering~~shall be divided by the total number of Plays ~~of all musical works~~ through the Offering during the Accounting Period ~~(other than Plays subject to subpart D of this part)~~ to yield a per-Play allocation~~, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part)) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under step 4 in this paragraph (b)(4) only (i.e., after the payable royalty pool has been determined), for~~. Plays of sound recordings of musical works with a playing time of over 5 minutes~~, each Play~~ shall be counted as provided in paragraph (c) of this section. The per-Play

allocation is then multiplied by the number of Plays of each musical work through the Offering during the Accounting Period to determine each per-work royalty allocation. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment*. For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

(1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays.

(2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays.

(3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays.

(4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays.

(5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays.

(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

(d) *Accounting*. The information underlying the calculations required by paragraph (b) of this section shall be ~~made~~provided to the Mechanical Licensing Collective in good faith and on the basis of the best knowledge, information, and belief at the time ~~payment~~reporting is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(2)(I), 17 U.S.C. 115(d)(4)(A)(i), and part 210 of this title. Without limitation, statements of account shall set forth each step of the calculations with sufficient information to allow the assessment of the accuracy and manner in which the payable royalty pool and per-Play allocations ~~(including information sufficient to demonstrate whether and how a royalty floor pursuant to § 385.22 does or does not apply)~~ were determined, and~~, for each Offering reported, also~~ indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

~~37 C.F.R. § 385.22~~

~~§ 385.22 Royalty floors for specific types of offerings.~~

~~Effective: July 8, 2019~~

~~(a) *In general*. The following royalty floors for use in step 3 of § 385.21(b)(3)(ii) shall apply to the respective types of Offerings.~~

> ~~(1) *Standalone non-portable Subscription—streaming only*. Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Streams are originally transmitted while the device has a live network connection, the royalty floor is the aggregate amount of 15 cents per subscriber per month.~~
>
> ~~(2) *Standalone non-portable Subscription—mixed*. Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Streams or Eligible Limited Downloads are originally transmitted, the royalty floor for use in step 3 of § 385.21(b)(3)(ii) is the aggregate amount of 30 cents per subscriber per month.~~
>
> ~~(3) *Standalone portable Subscription Offering*. Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor for use in step 3 of § 385.21(b)(3)(ii) is the aggregate amount of 50 cents per subscriber per month.~~
>
> ~~(4) *Bundled Subscription Offerings*. In the case of a Bundled Subscription Offering, the royalty floor for use in step 3 of § 385.21(b)(3)(ii) is the royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis for each End User who has made at least one Play of a licensed work during that month (each such End User to be considered an "active subscriber").~~

~~(b) *Computation of royalty rates*. For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Peri od, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.~~

Subpart D – Restricted Downloads, Purchased Content Locker Services, and Promotional ~~and Free-to-the-User Offerings~~Use

37 C.F.R.

§ 385.30 Scope.

Effective: ~~July 8~~January 1, ~~2019~~2023

This subpart establishes rates and terms of royalty payments for ~~Promotional Offerings, Free Trial Offerings, and Certain~~Restricted Downloads, Purchased Content Locker Services and Promotional Use provided by Subscription and ~~nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115~~non-Subscription Offerings.

§ 385.31 Royalty rates.

Effective: ~~July 8~~January 1, ~~2019~~2023

~~(a) *Promotional Offerings*. For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.~~

~~(b) *Free Trial Offerings*. For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.~~

(~~c~~a) ~~*Certain*~~ *Purchased Content Locker Services*. For ~~every~~Licensed Activity in connection with a Purchased Content Locker Service for which the Service Provider receives no ~~monetary consideration~~additional Revenues and for which the TCC is zero, the royalty rate is zero.

(b) *Restricted Downloads*. For Restricted Downloads the Licensee makes available other than those made available in connection with Purchased Content Locker Services, the royalty rate payable for each work embodied in the Restricted Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(c) *Promotional Use*. For Eligible Interactive Streams in connection with Promotional Use, the royalty rate is zero.

(d) *Unauthorized use*. If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	Docket No. 21–CRB–0001–PR (2023–2027)

INDEX OF COPYRIGHT OWNERS' EXHIBITS

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
JW Beekman	COEX-1.1	UMPG advances to writers 2016-2020	Restricted
JW Beekman	COEX-1.2	UMPG select overhead expenses 2016 & 2020	Restricted
JW Beekman	COEX-1.3	UMPG Financials 2009, 2010, 2016-2020	Restricted
JW Beekman	COEX-1.4	Writers Receiving Interactive Streaming Income 2016-2020	Restricted
JW Beekman	COEX-1.5	UMPG P&L	Restricted
Peter S. Brodsky	COEX-2.1	Written Direct Testimony of Peter S. Brodsky, dated October 28, 2016, filed in *Phonorecords III*	Restricted
Peter S. Brodsky	COEX-2.2	Need a Song for Your Commercial? Try These Campers, October 14, 2018	Public
Peter S. Brodsky	COEX-2.3	Streaming services accounted for nearly 80 percent of all music revenue in 2019, February 26, 2020	Public
Peter S. Brodsky	COEX-2.4	Spotify Premium support webpage	Public
Peter S. Brodsky	COEX-2.5	Amazon Music Unlimited webpage	Public
Peter S. Brodsky	COEX-2.6	Apple Music webpage	Public
Peter S. Brodsky	COEX-2.7	Amazon Music Unlimited Singe Device Plan webpage	Public
Peter S. Brodsky	COEX-2.8	Amazon becomes fastest-growing music streaming service, July 11, 2019	Public
David Kokakis Peter S. Brodsky	COEX-2.9	Goldman Sachs "Music in the Air" Report (2021)	Public
Peter S. Brodsky	COEX-2.10	Nest + YouTube Premium webpage	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Peter S. Brodsky	COEX-2.11	YouTube Premium 6 Month Free Offer webpage	Public
Peter S. Brodsky	COEX-2.12	Spotify Determines That It Overpaid Publishers in 2018, Requests Refund, June 21, 2019	Public
Peter S. Brodsky	COEX-2.13	Spotify are trying to claim back millions from publishers in new royalties row, June 24, 2019	Public
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.14	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.15	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.16	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.17	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.18	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.19	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.20	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.21	[redacted]	Restricted
Peter S. Brodsky	COEX-2.22	[redacted]	Restricted
Peter S. Brodsky	COEX-2.23	[redacted]	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Peter S. Brodsky	COEX-2.24	[redacted]	Restricted
Peter S. Brodsky	COEX-2.25	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.26	[redacted]	Restricted
Peter S. Brodsky	COEX-2.27	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.28	[redacted]	Restricted
Peter S. Brodsky	COEX-2.29	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.30	[redacted]	Restricted
Peter S. Brodsky Jeffrey A. Eisenach	COEX-2.31	[redacted]	Restricted
Timothy A. Cohan	COEX-3.1	[redacted]	Restricted
Timothy A. Cohan	COEX-3.2	[redacted]	Restricted
Timothy A. Cohan	COEX-3.3	[redacted]	Restricted
Timothy A. Cohan	COEX-3.4	[redacted]	Restricted
Timothy A. Cohan	COEX-3.5	[redacted]	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Timothy A. Cohan	COEX-3.6	[redacted]	Restricted
Timothy A. Cohan	COEX-3.7	[redacted]	Restricted
Timothy A. Cohan	COEX-3.8	[redacted]	Restricted
Timothy A. Cohan	COEX-3.9	[redacted]	Restricted
Timothy A. Cohan	COEX-3.10	[redacted]	Restricted
Timothy A. Cohan	COEX-3.11	[redacted]	Restricted
Timothy A. Cohan	COEX-3.12	[redacted]	Restricted
Timothy A. Cohan	COEX-3.13	[redacted]	Restricted
Thomas Kelly	COEX-4.1	Written Direct Testimony of Thomas Kelly, dated October 28, 2016, filed in *Phonorecords III*	Restricted
Thomas Kelly	COEX-4.2	Number of Songwriter Contracts	Restricted
Thomas Kelly	COEX-4.3	Writer Advance Spend Rollforward	Restricted
Thomas Kelly	COEX-4.4	Net Advance Write-Offs	Restricted
Thomas Kelly	COEX-4.5	Revenue Detail	Restricted
Thomas Kelly	COEX-4.6	Operating Expenses	Restricted
Thomas Kelly	COEX-4.7	Mechanical Revenue	Restricted
Thomas Kelly	COEX-4.8	Mechanical Interactive Audio Streaming Revenue	Restricted
Thomas Kelly	COEX-4.9	Performance Streaming Revenue Detail	Restricted
Thomas Kelly	COEX-4.10	Interactive Audio Streaming Revenue Breakdown	Restricted
Thomas Kelly	COEX-4.11	Audiovisual Streaming Revenue Breakdown	Restricted
Thomas Kelly	COEX-4.12	Fiscal Year 2020 Profit and Loss Statement	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
David Kokakis	COEX-5.1	Written Direct Testimony of David Kokakis, dated October 28, 2016, filed in *Phonorecords III*	Restricted
David Kokakis	COEX-5.2	Songs for Screens: Anna of the North Talks Netflix, “Dream Girl” Apple Spot, May 14, 2020	Public
David Kokakis	COEX-5.3	Year-End 2020 RIAA Revenue Statistics	Public
David Kokakis	COEX-5.4	News and Notes on 2016 RIAA Shipment and Revenue Statistics	Public
David Kokakis	COEX-5.5	News and Notes on 2015 RIAA Shipment and Revenue Statistics	Public
David Kokakis	COEX-5.6	Market Capitalization of Spotify (SPOT)	Public
David Kokakis	COEX-5.7	Total Enterprise Value (TEV) for Spotify Technology S.A.	Public
David Kokakis	COEX-5.8	Spotify Technology S.A. Announces Financial Results for First Quarter 2021, April 28, 2021	Public
David Kokakis	COEX-5.9	Spotify’s ARPU Drops, Subscriber 'Lifetime Value' Has Grown, June 3, 2021	Public
David Kokakis Jeffrey A. Eisenach	COEX-5.10	[redacted]	Restricted
David Kokakis	COEX-5.11	Tidal Sound Quality webpage	Public
David Kokakis	COEX-5.12	Deezer HiFi webpage	Public
David Kokakis	COEX-5.13	Spotify has a major audio-quality upgrade coming later this year, February 22, 2021	Public
David Kokakis	COEX-5.14	Stream On: Five Things to Know About Spotify HiFi February 22, 2021	Public
David Kokakis	COEX-5.15	Spotify HiFi Release Date, Price, Quality, Features, Rumors and Song Catalog, August 15, 2021	Public
David Kokakis	COEX-5.16	[redacted]	Restricted
David Kokakis	COEX-5.17	Apple Music's Spatial Audio Is Sometimes Amazing But Mostly Inconsistent, June 9, 2021	Public
David Kokakis	COEX-5.18	Apple Press Release, Apple Music announces Spatial Audio with Dolby Atmos; will bring Lossless Audio to entire catalog, May 17, 2021	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
David Kokakis	COEX-5.19	Amazon Press Release, Amazon Music HD For All, Now at No Extra Cost, May 17, 2021	Public
David Kokakis Jeffrey A. Eisenach	COEX-5.20	[redacted]	Restricted
David Kokakis	COEX-5.21	[redacted]	Restricted
David Kokakis	COEX-5.22	[redacted]	Restricted
David Kokakis Jeffrey A. Eisenach	COEX-5.23	[redacted]	Restricted
David Kokakis Jeffrey A. Eisenach	COEX-5.24	[redacted]	Restricted
David Kokakis Jeffrey A. Eisenach	COEX-5.25	[redacted]	Restricted
David Kokakis Jeffrey A. Eisenach	COEX-5.26	[redacted]	Restricted
David Kokakis Jeffrey A. Eisenach	COEX-5.27	[redacted]	Restricted
David Kokakis Jeffrey A. Eisenach	COEX-5.28	[redacted]	Restricted
David Kokakis	COEX-5.29	[redacted]	Restricted
David Kokakis	COEX-5.30	[redacted]	Restricted
David Kokakis	COEX-5.31	[redacted]	Restricted
David Kokakis	COEX-5.32	[redacted]	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
David Kokakis	COEX-5.33	[redacted]	Restricted
David Kokakis	COEX-5.34	[redacted]	Restricted
David Kokakis	COEX-5.35	[redacted]	Restricted
Annette Yocum	COEX-6.1	Written Direct Testimony of Annette Yocum, dated October 28, 2016, filed in *Phonorecords III*	Restricted
Annette Yocum	COEX-6.2	Warner Chappell Financials	Restricted
Annette Yocum	COEX-6.3	Overhead	Restricted
Annette Yocum	COEX-6.4	Streaming Rates 2016 - 2020	Restricted
Annette Yocum	COEX-6.5	Historical Revenue	Restricted
Annette Yocum	COEX-6.6	Performance income	Restricted
Jeffrey A. Eisenach	COEX-7.1	Compendium of Amazon Royalty Data	Restricted
Jeffrey A. Eisenach	COEX-7.2	Compendium of Apple Royalty Data	Restricted
Jeffrey A. Eisenach	COEX-7.3	Compendium of Audiomack Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.4	Compendium of Deezer Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.5	FanLabel Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.6	Compendium of iHeart Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.7	Compendium of LiveXLive Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.8	M&M Media Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.9	MediaNet Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.10	Compendium of Midwest Tape Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.11	Mixcloud Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.12	Pacemaker Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.13	Compendium of Pandora Royalty Data	Restricted
Jeffrey A. Eisenach	COEX-7.14	Qobuz Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.15	Compendium of Soundcloud Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.16	Compendium of Spotify Royalty Data	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Jeffrey A. Eisenach	COEX-7.17	Compendium of Tidal Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.18	Weav Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.19	Wolfgang's Royalty Data from the MLC	Restricted
Jeffrey A. Eisenach	COEX-7.20	MLC Rate Report	Restricted
Jeffrey A. Eisenach	COEX-7.21	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.22	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.23	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.24	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.25	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.26	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.27	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.28	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.29	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.30	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.31	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.32	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.33	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.34	[redacted]	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Jeffrey A. Eisenach	COEX-7.35	Compendium of Google Royalty Data from MLC	Restricted
Jeffrey A. Eisenach	COEX-7.36	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.37	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.38	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.39	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.40	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.41	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.42	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.43	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.44	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.45	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.46	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.47	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.48	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.49	Intentionally Omitted	N/A
Jeffrey A. Eisenach	COEX-7.50	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.51	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.52	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.53	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.54	[redacted]	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Jeffrey A. Eisenach	COEX-7.55	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.56	WW Amazon Music Monthly Business Review, July 2018	Restricted
Jeffrey A. Eisenach	COEX-7.57	Hi-Fi Music Streaming Competitors Mull their Options Following Apple, Amazon Lossless News, May 19, 2021	Public
Jeffrey A. Eisenach	COEX-7.58	Apple Buys Classical Music Service, Primephonic, August 30, 2021	Public
Jeffrey A. Eisenach	COEX-7.59	Amazon Makes its Lossless Music Streaming Service a Free Upgrade, May 17, 2021	Public
Jeffrey A. Eisenach	COEX-7.60	Is Qobuz Worth It, Here's How the Hi-Fi Music Streamer Compares to Everyone Else, July 27, 2021	Public
Jeffrey A. Eisenach	COEX-7.61	Qobuz - Music Streaming Offers	Public
Jeffrey A. Eisenach	COEX-7.62	Amazon Prime Student Discount, August 26, 2021	Public
Jeffrey A. Eisenach	COEX-7.63	Amazon Music Unlimited FAQ	Public
Jeffrey A. Eisenach	COEX-7.64	Spotify Pick Your Premium	Public
Jeffrey A. Eisenach	COEX-7.65	Spotify Premium Promotional Offer Terms	Public
Jeffrey A. Eisenach	COEX-7.66	Spotify Premium Student Tier 3 Month Introductory Trial Offer Terms and Conditions	Public
Jeffrey A. Eisenach	COEX-7.67	Spotify MLC Revenue Reports 2021	Restricted
Jeffrey A. Eisenach	COEX-7.68	Pandora UMG Royalty Data	Restricted
Jeffrey A. Eisenach	COEX-7.69	Amazon 2020 UMG Top Sheets	Restricted
Jeffrey A. Eisenach	COEX-7.70	Spotify Label Royalty Data	Restricted
Jeffrey A. Eisenach	COEX-7.71	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.72	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.73	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.74	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.75	[redacted]	Restricted

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Jeffrey A. Eisenach	COEX-7.76	[redacted]	Restricted
Jeffrey A. Eisenach	COEX-7.77	Amazon Q2 2021 10-Q	Public
Jeffrey A. Eisenach	COEX-7.78	Alphabet Q2 2021 10-Q	Public
Jeffrey A. Eisenach	COEX-7.79	Spotify July 2021 Form 6-K	Public
Jeffrey A. Eisenach	COEX-7.80	Apple Just Bought a Company that Acts Like a Record Label. Why? January 4, 2019	Public
Jeffrey A. Eisenach	COEX-7.81	Tencent Music now has joint labels with all 'big three' record labels, March 22, 2021	Public
Jeffrey A. Eisenach	COEX-7.82	Apple 2020 10-K	Public
Robin Flynn	COEX-8.1	Mid-Year 2021 RIAA Revenue Statistics, September 13, 2021	Public
Robin Flynn	COEX-8.2	Spotify Launches in the U.S at Last, July 14, 2011	Public
Robin Flynn	COEX-8.3	News and Notes on 2014 RIAA Music Industry Shipment and Revenue Statistics	Public
Robin Flynn	COEX-8.4	Google Launches 'Google Play Music All Access' On-Demand $9.99 A Month Subscription Service, May 15, 2013	Public
Robin Flynn	COEX-8.5	Apple announces its streaming music service, Apple Music, Can the tech giant pose a legitimate threat to Spotify?, June 8, 2015	Public
Robin Flynn	COEX-8.6	Now Streaming: Amazon Music Unlimited, October 12, 2016	Public
Robin Flynn	COEX-8.7	Here's the most popular feature on the Amazon Echo, May 10, 2016	Public
Robin Flynn	COEX-8.8	Pandora Premium Will Change The Way You Listen to Music, March 13, 2017	Public
Robin Flynn	COEX-8.9	Compendium of RIAA Revenue Reports	Public
Robin Flynn	COEX-8.10	[redacted]	Restricted
Robin Flynn	COEX-8.11	Amazon Seller Fees: Cost of Selling on Amazon in 2021, September 30, 2021	Public
Robin Flynn	COEX-8.12	Time with Tunes: How Technology is Driving Music Consumption, November 2, 2017	Public
Robin Flynn	COEX-8.13	Music Consumer Profile 2020 Report	Public
Robin Flynn	COEX-8.14	[redacted]	Restricted
Robin Flynn	COEX-8.15	Don't Let Amazon Get Any Bigger, October 8, 2020	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.16	Apple Music's Biggest Swipe At Spotify Yet: Drake's Exclusive New Album, April 10, 2016	Public
Robin Flynn	COEX-8.17	Rewriting the Playbook for Podcast Advertising, January 2020	Public
Robin Flynn	COEX-8.18	Spotify's Head of Global Ads Business and Platform Jay Richman Talks New Spotify Podcast Ads, January 8, 2020	Public
Robin Flynn	COEX-8.19	How Spotify Is Strengthening Our Investment in Podcast Advertising With Acquisition of Megaphone, November 10, 2020	Public
Robin Flynn	COEX-8.20	Spotify Technology S.A. Presents at Bank of America Securities 2021 Media, Communications and Entertainment Conference September 14, 2021	Public
Robin Flynn	COEX-8.21	Enjoy 6 free months of Apple Music when you purchase select products	Public
Robin Flynn	COEX-8.22	Get Apple Music free for 6 months	Public
Robin Flynn	COEX-8.23	Which Cars Have Amazon Alexa Integration?, December 27, 2020	Public
Robin Flynn	COEX-8.24	Introducing Apple Music — All The Ways You Love Music. All in One Place, June 8, 2015	Public
Robin Flynn	COEX-8.25	The Infinite Dial 2020	Public
Robin Flynn	COEX-8.26	Apple Inc., Material rev/EPS upside despite supply chain headwinds driven by across the board strength, July 28, 2021	Public
Robin Flynn	COEX-8.27	YouTube Music and YouTube Premium officially launch in US, Canada, UK, and other countries, June 18, 2018	Public
Robin Flynn	COEX-8.28	Google Play Music to shut down starting in September, will disappear by December, August 5, 2020	Public
Robin Flynn	COEX-8.29	Apple Q1'21 product shipments shot up YOY across nearly all segments, May 11, 2021	Restricted
Robin Flynn	COEX-8.30	Apple iPhone shipments break record in Q4'20 as 5G goes Mainstream, February 4, 2021	Restricted
Robin Flynn	COEX-8.31	Compendium of Spotify Press Releases	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.32	Compendium of Pandora/Sirius XM SEC Filings	Public
Robin Flynn	COEX-8.33	Transaction Summary - M&A/Private Placements, October 9 2021	Restricted
Robin Flynn	COEX-8.34	Who Will Own Spotify in Five Years, August 29, 2019	Public
Robin Flynn	COEX-8.35	Global 2000, May 13, 2021	Public
Robin Flynn	COEX-8.36	Compendium of Apple SEC Filings	Public
Robin Flynn	COEX-8.37	Alphabet 2020 Annual Report	Public
Robin Flynn	COEX-8.38	Amazon 2020 Annual Report	Public
Robin Flynn	COEX-8.39	Fortune 500 List, 2021	Public
Robin Flynn	COEX-8.40	Amazon's Third-Party Marketplace Is Its Cash-Cow Not AWS, February 5, 2021	Public
Robin Flynn	COEX-8.41	Global Gross Merchandise Volume (GMV) of Amazon from 2018 to 2020 by seller type, August 11, 2021	Public
Robin Flynn	COEX-8.42	Fortune Global 500, 2021	Public
Robin Flynn	COEX-8.43	Compendium of Spotify Earnings Calls	Public
Robin Flynn	COEX-8.44	Are Podcasts Threatening the Growth of the Music Industry?, December 16, 2019	Public
Robin Flynn	COEX-8.45	Intentionally Omitted	N/A
Robin Flynn	COEX-8.46	Spotify Pays Over $100 Million for Rogan Podcast, May 20, 2020	Public
Robin Flynn	COEX-8.47	Spotify strikes $60 million podcast deal with Barstool’s ‘Call Her Daddy,’ June 17, 2021	Public
Robin Flynn	COEX-8.48	[redacted]	Restricted
Robin Flynn	COEX-8.49	Spotify Acquires Sports-Talk App, March 31, 2021	Public
Robin Flynn	COEX-8.50	Spotify buys Podz to improve podcast discovery with AI– Android Central, June 18, 2021	Public
Robin Flynn	COEX-8.51	Compendium of Spotify SEC Filings	Public
Robin Flynn	COEX-8.52	Introducing paid subscriptions, made simple for you and your listeners, April 27, 2021	Public
Robin Flynn	COEX-8.53	Spotify’s Podcasts Subscriptions service is now open to all US creators, August 24, 2021	Public
Robin Flynn	COEX-8.54	Spotify Ushers In New Era of Podcast Monetization With New Tools for All Creators, April 27, 2021	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.55	Spotify Stock Goes Public, Giving the Streaming Music Giant a $30 Billion Market Cap, April 3, 2018	Public
Robin Flynn	COEX-8.56	A New Era for Podcast Advertising, February 22, 2021	Public
Robin Flynn	COEX-8.57	Spotify: Streaming Along, February 8, 2021	Restricted
Robin Flynn	COEX-8.58	Spotify Launches Our Newest Exploration: A Limited Release of Car Thing, a Smart Player for Your Car, April 13, 2021	Public
Robin Flynn	COEX-8.59	Spotify's voice-controlled 'Car Thing' is available for some subscribers, April 13, 2021	Public
Robin Flynn	COEX-8.60	Sirius XM to buy Pandora for $3.5 billion; how it affects your music, September 24, 2018	Public
Robin Flynn	COEX-8.61	Compendium of Pandora/Sirius XM Earnings Calls	Public
Robin Flynn	COEX-8.62	Apple AirPods Are Now Available, December 13, 2016	Public
Robin Flynn	COEX-8.63	Sirius XM's Deal to Buy Pandora Is a Win for Legacy Media, September 25, 2018	Public
Robin Flynn	COEX-8.64	Sirius XM Announces Merger Agreement with Pandora, September 24, 2018	Public
Robin Flynn	COEX-8.65	Pandora -Premium Access	Public
Robin Flynn	COEX-8.66	Pandora - Upgrade to Pandora Plus or Pandora Premium	Public
Robin Flynn	COEX-8.67	Compendium of Pandora Press Releases	Public
Robin Flynn	COEX-8.68	Sirius XM Holdings Inc.'s (SIRI) Management Presents at Credit Suisse 23rd Annual Communications Conference, June 15, 2021	Public
Robin Flynn	COEX-8.69	Stitcher Premium	Public
Robin Flynn	COEX-8.70	SoundCloud Selects Pandora as Ad Sales Partner in the U.S., October 3, 2018	Public
Robin Flynn	COEX-8.71	Testimony of Dr. Leslie Marx in In re Petition of Pandora Media, Inc	Public
Robin Flynn	COEX-8.72	Apple Music & Privacy	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.73	Spotify $1.3bn debt funding is 'for general corporate purposes', February 25, 2021	Public
Robin Flynn	COEX-8.74	Tim Cook: We're not doing Apple Music for the money, August 8, 2018	Public
Robin Flynn	COEX-8.75	Intentionally Omitted	Public
Robin Flynn	COEX-8.76	[redacted] June 2, 2016	Restricted
Robin Flynn	COEX-8.77	[redacted], June 28, 2016	Restricted
Robin Flynn	COEX-8.78	[redacted]	Restricted
Robin Flynn	COEX-8.79	Economics of Music Streaming Inquiry, November, 2020	Public
Robin Flynn	COEX-8.80	Economics of Music Streaming, July 15, 2021	Public
Robin Flynn	COEX-8.81	Compendium of Apple Earnings Calls	Public
Robin Flynn	COEX-8.82	Apple Inc. Analyst notes, July 28, 2021	Restricted
Robin Flynn	COEX-8.83	Spotify's New Funding Round Values Music Streamer at $8.5 Billion, June 10, 2015	Public
Robin Flynn	COEX-8.84	Apple Grows Its Ecosystem, And Its Advantage, April 12, 2017	Public
Robin Flynn	COEX-8.85	Big 4 SVOD services have monster combined content budget, November 16, 2020	Restricted
Robin Flynn	COEX-8.86	Nest + YouTube Premium	Public
Robin Flynn	COEX-8.87	Recent Releases support continued growth of Apple product shipments in Q2'21, August 9, 2021	Restricted
Robin Flynn	COEX-8.88	UBS Evidence Lab Inside: Examining the AMZN Consumer (2020), December 3, 2020	Restricted
Robin Flynn	COEX-8.89	Wearable Tech: Hearables on a rampage, August 3, 2020	Restricted
Robin Flynn	COEX-8.90	Smart wireless earphones: the next device to reach annual sales of 1bn units?, June 30, 2021	Restricted
Robin Flynn	COEX-8.91	Airpods: Accessory or the Next Big Thing, May 15, 2020	Public
Robin Flynn	COEX-8.92	AirPods were a $6 billion business for Apple this year and will be even bigger next year, top analyst says, December 20, 2019	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.93	Why did Apple buy Beats for 3.2 Billion July 28, 2020	Public
Robin Flynn	COEX-8.94	Apple, The speakers of the house	Public
Robin Flynn	COEX-8.95	Wearable tech: Apple continues to rule smartwatch market, July 16, 2020	Restricted
Robin Flynn	COEX-8.96	Oracle Lawyer says Google's Android generated $31 billion revenue, January 1, 2016	Public
Robin Flynn	COEX-8.97	Android now powers 2.5B devices, May 7, 2019	Public
Robin Flynn	COEX-8.98	How Google Makes Money from Android Business Model Explained, January 14, 2020	Public
Robin Flynn	COEX-8.99	US mobile projections through 2030, June 3, 2020	Restricted
Robin Flynn	COEX-8.100	Amazon's Purchase of Wondery is a Big Bet on Podcast Advertising, January 7, 2021	Public
Robin Flynn	COEX-8.101	Amazon to Acquire Podcaster Wondery, December 31, 2020	Public
Robin Flynn	COEX-8.102	Google to Stop Selling Ads Based on Your Specific Web Browsing, March 3, 2021	Public
Robin Flynn	COEX-8.103	Here's why Amazon's new music ambitions should scare Apple and Spotify, September 27, 2016	Public
Robin Flynn	COEX-8.104	[redacted]	Restricted
Robin Flynn	COEX-8.105	[redacted], December 2016	Restricted
Robin Flynn	COEX-8.106	[redacted]	Restricted
Robin Flynn	COEX-8.107	Revival - Music Emerges as a Growth Industry, April 30, 2018	Restricted
Robin Flynn	COEX-8.108	Amazon Music Is Available for Free Now, April 19, 2019	Public
Robin Flynn	COEX-8.109	Echo Studio - High-fidelity smart speaker with 3D audio and Alexa	Public
Robin Flynn	COEX-8.110	Amazon Music’s Free Tier Is More Advertising Play Than Spotify Killer, Analysts Say, April 18, 2019	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.111	Amazon's Hardware Is the Ultimate Black Box, October 1, 2021	Public
Robin Flynn	COEX-8.112	Smart Speaker Outlook, 2014 - 2025,	Public
Robin Flynn	COEX-8.113	More than 100 million Alexa devices have been sold, January 4, 2019	Public
Robin Flynn	COEX-8.114	Amazon sees Alexa devices more than double in just one year, January 6, 2020	Public
Robin Flynn	COEX-8.115	Nearly 70% of US smart speaker owners use Amazon Echo devices, February 10, 2020	Public
Robin Flynn	COEX-8.116	[redacted]	Restricted
Robin Flynn	COEX-8.117	Amazon Is Actually Losing Money From Its New Music Service, October 18, 2016	Public
Robin Flynn	COEX-8.118	[redacted], October 2016	Restricted
Robin Flynn	COEX-8.119	Amazon's Echo and Alexa could add $11 billion in revenue by 2020, September 23, 2016	Public
Robin Flynn	COEX-8.120	Global smart speaker market 2021 forecast, October 22, 2020	Public
Robin Flynn	COEX-8.121	Global Smart Speaker market shipments hit 154 million in 2020 - up 58 percent YoY, February 23, 2021	Public
Robin Flynn	COEX-8.122	Global consumers continue to snap up smart speakers, August 20, 2019	Restricted
Robin Flynn	COEX-8.123	Demand for smart display units forecast to spike 80% in 2020, June 29, 2020	Restricted
Robin Flynn	COEX-8.124	Amazon Music Joins Podcast Fray, September 17, 2020	Public
Robin Flynn	COEX-8.125	Market share of global smart speaker shipments from 3rd quarter 2016 to 4th quarter 2020, by vendor, 2021	Restricted
Robin Flynn	COEX-8.126	Amazon Takes On Spotify In Podcasting, September 18, 2020	Public
Robin Flynn	COEX-8.127	Amazon doesn't sell Echo speakers at a loss, says Bezos — unless they're on sale, July 29, 2020	Public
Robin Flynn	COEX-8.128	Amazon maintains big lead over Google and Apple in U.S. smart speaker market, new study says, August 4, 2021	Public
Robin Flynn	COEX-8.129	The Infinite Dial 2021	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.130	Echo Surpasses Amazon Prime in Building Customer Loyalty, January 4, 2018	Public
Robin Flynn	COEX-8.131	Research Shows that Amazon Echo Owners Buy 29% More from Amazon, May 30, 2018	Public
Robin Flynn	COEX-8.132	Apple Unveils Podcast Subscriptions, April 20, 2021	Public
Robin Flynn	COEX-8.133	Apple Podcasts Subscriptions and channels are now available worldwide, June 15, 2021	Public
Robin Flynn	COEX-8.134	2020 Letter to Shareholders, April 15, 2021	Public
Robin Flynn	COEX-8.135	Amazon Prime member total reaches 142 million in U.S. with more shoppers opting in for a full year, data shows, January 20, 2021	Public
Robin Flynn	COEX-8.136	Profile: Amazon Prime Video (US) 2021, July 13, 2021	Restricted
Robin Flynn	COEX-8.137	Amazon 2014 Q2 Earnings Call	Public
Robin Flynn	COEX-8.138	Apple confirms it bought podcast curation app Scout FM earlier this year, September 25, 2020	Public
Robin Flynn	COEX-8.139	U.S. Podcast Ad Revenues Grew 19% YoY in 2020; set to exceed $1B this year and $2B by 2023, May 12, 2021	Public
Robin Flynn	COEX-8.140	Spotify Premium - Spotify (US)	Public
Robin Flynn	COEX-8.141	Amazon Music Unlimited Plans	Public
Robin Flynn	COEX-8.142	Pandora Premium Plans	Public
Robin Flynn	COEX-8.143	Apple - Apple Music	Public
Robin Flynn	COEX-8.144	Spotify is increasing its prices — here’s which plans are getting more expensive, April 27, 2021	Public
Robin Flynn	COEX-8.145	Spotify pushes prices up, but do not expect dramatic effects, April 27, 2021	Public
Robin Flynn	COEX-8.146	Podcast Industry Report: Market Growth and Advertising Statistics in 2021, July 29, 2021	Public
Robin Flynn	COEX-8.147	Apple Music Vs. Spotify Vs. Tidal: Everything You Need to Know, June 8, 2015	Public
Robin Flynn	COEX-8.148	Best Music Streaming Services, September 3, 2021	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.149	Amazon Music rolls out a lossless streaming tier that Spotify and Apple can't match, September 17, 2019	Public
Robin Flynn	COEX-8.150	Amazon makes its lossless music streaming service a free upgrade, May 17, 2021	Public
Robin Flynn	COEX-8.151	Apple Music announces Spatial Audio with Dolby Atmos; will bring Lossless Audio to entire catalog, May 17, 2021	Public
Robin Flynn	COEX-8.152	Amazon Music HD	Public
Robin Flynn	COEX-8.153	Five Things to Know About Spotify HiFi, Spotify Newsroom February 22, 2021	Public
Robin Flynn	COEX-8.154	Spotify HiFi release date, price, quality, features, rumors and song catalog, August 17, 2021	Public
Robin Flynn	COEX-8.155	Amazon - Amazon Prime Student	Public
Robin Flynn	COEX-8.156	Apple Free Trial	Public
Robin Flynn	COEX-8.157	Apple Music, Verizon Unlimited Plan Users Get 6 Free Months	Public
Robin Flynn	COEX-8.158	YouTube Music Premium	Public
Robin Flynn	COEX-8.159	Spotify - Get 3 months of Spotify Premium for free	Public
Robin Flynn	COEX-8.160	Spotify is testing a less restrictive ad-supported tier costing $0.99 a month, August 3, 2021	Public
Robin Flynn	COEX-8.161	[redacted]	Restricted
Robin Flynn	COEX-8.162	Amazon - What are the Differences Between the Amazon Music Subscriptions	Public
Robin Flynn	COEX-8.163	Amazon Music gives the gift of free streaming, November 18, 2019	Public
Robin Flynn	COEX-8.164	Amazon makes its music streaming service free with ads, November 19, 2019	Public
Robin Flynn	COEX-8.165	Amazon's Ad Supported Strategy Goes Way Beyond Music, April 17, 2019	Public
Robin Flynn	COEX-8.166	Amazon Music Prime	Public
Robin Flynn	COEX-8.167	Amazon Music Unlimited with Audible	Public
Robin Flynn	COEX-8.168	Amazon Music Unlimited with Disney	Public
Robin Flynn	COEX-8.169	Spotify Is Giving Premium Customers Free Hulu, March 12, 2019	Public
Robin Flynn	COEX-8.170	Spotify Premium Student	Public
Robin Flynn	COEX-8.171	Spotify and AT&T	Public

Sponsoring Witness(es)	COEX	Description	Restricted/ Public
Robin Flynn	COEX-8.172	Apple - Apple One	Public
Robin Flynn	COEX-8.173	Music Streamers Tap Live Events to Stand Out, July 10, 2019	Public
Robin Flynn	COEX-8.174	Loss-making Spotify will continue to put growth ahead of profit for 'next few years,' May 6, 2020	Public
Robin Flynn	COEX-8.175	Amazon - Discounted Amazon Prime for qualifying EBT and government assistance recipients	Public
Robin Flynn	COEX-8.176	12 ways Amazon gets you to spend more, June 20, 2016	Public
Robin Flynn	COEX-8.177	How Google's $150 billion advertising business works, May 18, 2021	Public
Robin Flynn	COEX-8.178	Pandora 2017 Q3 Prepared Remarks	Public
Robin Flynn	COEX-8.179	Fortune 500 List (2019)	Public
Robin Flynn	COEX-8.180	How Pandora Turns Personalization into $1 Billion in Ad Revenue (VB Live) October 22, 2018	Public
Robin Flynn	COEX-8.181	The Only Tool You Need to Make 'Big Data' Actionable, July 19, 2017	Public
Robin Flynn	COEX-8.182	Spotify - Targeting Ad Studio	Public
Robin Flynn	COEX-8.183	Brand Loyalty, Investopedia	Public
Robin Flynn	COEX-8.184	S&P CAP IQ Compendium	Restricted
Robin Flynn	COEX-8.185	[redacted]	Restricted
Robin Flynn	COEX-8.186	Amazon 2015 Annual Report	Public
Robin Flynn	COEX-8.187	Apple 2015 Annual Report	Public
Robin Flynn	COEX-8.188	Alphabet 2015 Annual Report	Public
Richard Watt	COEX-9.1	To Head Off Regulators, Google Makes Certain Words Taboo, August 7, 2020	Public
Richard Watt	COEX-9.2	Beatles Catalog Goes on Streaming Services, December 23, 2015	Public
Richard Watt	COEX-9.3	U.S. Bureau of Labor Statistics, Occupational Outlook Handbook: Music Directors and Composers	Public
Richard Watt	COEX-9.4	Getting music on Spotify, Spotify for Artists	Public
Richard Watt	COEX-9.5	Request a Songwriter Page, Spotify Research	Public
Richard Watt	COEX-9.6	Loud&Clear by Spotify	Public
Richard Watt	COEX-9.7	Over 60,000 Tracks are now uploaded to Spotify every day, February 24, 2021	Public

Sponsoring Witness(es)	**COEX**	**Description**	**Restricted/ Public**
Richard Watt	COEX-9.8	Spotify chooses Google Cloud Platform to power data infrastructure, February 23, 2016	Public
Richard Watt	COEX-9.9	Spotify will spend nearly $450 million on Google's cloud over 3 years, March 20, 2018	Public
Richard Watt	COEX-9.10	Switching clouds: What Spotify learned when it swapped AWS for Google's cloud, October 21, 2016	Public
Richard Watt	COEX-9.11	Spotify expands its Programmatic Guaranteed offering with audio ads	Public
Richard Watt	COEX-9.12	Spotify Loses $10 Million in Revenue from Switching Off Google Sales Manager, October 28, 2019	Public
Richard Watt	COEX-9.13	Spotify Accuses Apple of Anticompetitive Practices in Europe, March 13, 2019	Public
Richard Watt	COEX-9.14	Google and Apple attacked on app store 'monopoly,' April 22, 2021	Public
Richard Watt	COEX-9.15	Why Spotify Is Such an Awkward—and Necessary—Critic of Apple's Power, Slate March 13, 2019	Public
Richard Watt	COEX-9.16	Why Do We Still Pay Only $10 a Month for Music?, December 11, 2019	Public
Richard Watt	COEX-9.17	Spotify Q4 2020 Earnings Call Transcript	Public
Richard Watt	COEX-9.18	[redacted]	Restricted
Richard Watt	COEX-9.19	Warner Music Group Corp., 2019 10-K	Public
Richard Watt	COEX-9.20	Warner Music Group Corp., Q4 2019 10Q	Public
Richard Watt	COEX-9.21	Spotify U.S. P&L	Restricted
Steve Bogard	COEX-10.1	Written Direct Testimony of Steve Bogard, dated October 28, 2016, filed in *Phonorecords III*	Public

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)	Docket No. 21–CRB–0001–PR (2023–2027)

DECLARATION OF BENJAMIN K. SEMEL
REGARDING RESTRICTED INFORMATION

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers' Association ("NMPA") and the Nashville Songwriters Association International ("NSAI" and, together with the NMPA, the "Copyright Owners") in the above-captioned proceeding (the "Proceeding").

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 20, 2021 (the "Protective Order"), I submit this declaration in connection with the Copyright Owners' October 13, 2021 written direct statement (the "Written Direct Statement"), comprised of the following components: (i) Introductory Memorandum; (ii) Copyright Owners' Proposed Rates and Terms; (iii) Index of Copyright Owners' Exhibits; (iv) Written Direct Testimony of Steve Bogard; (v) Written Direct Testimony of Jamie Floyd; (vi) Written Direct Testimony of Angela Hunte; (vii) Written Direct Testimony of Autumn Rowe; (viii) Written Direct Testimony of Jimmy Yeary; (ix) Written Direct Testimony of JW Beekman (x) Written Direct Testimony of Peter Brodsky; (xi) Written Direct Testimony of Timothy Cohan; (xii) Written Direct Testimony of Thomas Kelly; (xiii) Written Direct Testimony of David Kokakis; (xiv) Written Direct Testimony of Annette Yocum; (xv) Written Direct Testimony Jeffrey A. Eisenach;

(xvi) Written Direct Testimony of Robin Flynn; (xvii) Written Direct Testimony of Daniel F. Spulber; (xviii) Written Direct Testimony of Richard Watt; (xix) Designated *Phonorecords III* Testimony of Christopher V. Barry; (xx) Designated *Phonorecords III* Testimony of David Israelite; (xxi) Designated *Phonorecords III* of Testimony Jeffrey A. Eisenach; (xxii) Designated *Phonorecords III* Testimony of Joshua Gans; (xxiii) Designated *Phonorecords III* of Testimony Mark Rysman; (xiv) Designated *Phonorecords III* Testimony of Jim Timmins; (xxv); Designated *Phonorecords III* Testimony of Richard Watt; and (xxvi) Copyright Owners' Exhibits.

3. I have reviewed Copyright Owners' Written Direct Submission. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions that the Copyright Owners have indicated and will make to the publicly-filed version of the Written Direct Statement is necessitated by the designation of that information as "confidential information" under the Protective Order by either a Producing Participant in this proceeding or in the Phonorecords III proceeding or by a Producer, as those terms are defined in the Protective Order, or pursuant to one or more of the Orders of the Copyright Royalty Judges dated August 9, 2021, August 25, 2021, and September 2, 2021 in this proceeding (eCRB Docket Nos. 25574, 25630, and 25639). Because the Copyright Owners are bound under such orders to treat as "Restricted" and to redact information designated "confidential information" by Participants and Producers, they are doing so. Copyright Owners reserve all rights and arguments as to whether any such information is, in fact, "confidential information."

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 13, 2021
New York, New York

_/s/ Benjamin K. Semel__________
Benjamin K. Semel (N.Y. Bar No. 2963445)
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036-6569
Telephone: (212) 421-4100
Facsimile: (212) 326-0806
Email: bsemel@pryorcashman.com

Counsel for Copyright Owners

Proof of Delivery

I hereby certify that on Wednesday, October 27, 2021, I provided a true and correct copy of the [CORRECTED] Volume I - Copyright Owners' Introduction to the Written Direct Statement (as corrected by notice of errata) to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Signed: /s/ Benjamin K Semel